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The Supreme Court Issue

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Since the Restatement of Torts

HON. OLIVER W. BRANCH



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THE SUPREME COURT ISSUE

Speeches of the President Clearly Raise the Issue of Whether Henceforth We Ought Not to Have a Legislative Rather Than a Constitutional Form of Government—The Former Means of Course an All-Powerful Central Government with the Rights of the States Subordinated to It—Plan to Put Men on the Court Committed to Certain Views Would Destroy Its Efficiency, Diminish Popular Respect, and Fundamentally Alter Our Governmental Theory—Speed Undesirable Where Great Fundamentals Are Involved*

BY FREDERICK H. STINCHFIELD
President of the American Bar Association

ONLY one matter today is of transcendent importance. What will happen to the Supreme Court of the United States? Many continue to remind us that the President's proposals suggest changes other than that which concerns the Supreme Court; to these lesser changes we need not refer. They are less consequential than the main issue. Whether we agree with these incidental proposals need claim little of our attention. We may not be in accord; but let's have no debate on them; they are really but camouflage. We can, if needs be, yield on all of them. We may wish it were not necessary to do so, for some of them are, in themselves, dangerous. But we can, with some equanimity, see dynamite applied to lesser buildings if thereby the main structure is saved.

We can't look with satisfaction, for instance, on a provision which sets up a roving group of particular judges (those to be appointed) who, too easily, can be sent to jurisdictions where the government wishes such selected judges. We can hardly approve of the appointment of new judges where the work of the court is current, the appointments to be made merely because the efficient judges in those jurisdictions have reached a stipulated age; added ones can't improve a perfect calendar condition, and wisdom and efficiency are not a constant accompaniment of early or middle age. We don't like it that only the government has the absolute right to go direct to the Supreme Court. But we can keep silent on these objections if thereby we can save the Supreme Court. It's the violation of the Supreme Court in which we are interested; the selection of those six new judges who are to ride herd on the present ones who won't be driven into the Executive corral. But the Supreme Court must not be destroyed, and the Constitution must stay—until that time when the people, in the manner provided in the Constitution, shall say otherwise. When they shall have so decreed by that method, lawyers will protest no longer.

The President, in his speeches of March 4th and 9th, discarding, for the moment, the irrelevant details of his message proposing the legislation, clearly raises the issue of whether we ought not, henceforth, to have a legislative, rather than a constitutional form of government. Recall what he said. If the analysis is correct and the President means what he says, we know what the issue is. That will be a gain, for hitherto, if one may judge from all the testimony given and speeches made, there has been considerable uncertainty as to what is the significance of the proposal.

I first refer to a paragraph of the President's argument which he must have intended as the basic explanation of why he wishes the Supreme Court increased by six members. On at least two occasions he had referred, without its context, to a remark of Chief Justices Hughes:

"We are under a Constitution, but the Constitution is what the judges say it is."

Thereupon the Chief Executive added, speaking of the charge that he proposes to pack the Court:

"But if by that phrase the charge is made that I will appoint . . . justices . . . who understand those modern conditions—that I will appoint *justices who will not undertake to over-ride the judgment of the Congress on legislative policy* . . . if the appointment of such justices can be called 'packing the court,' I say that I, and with me the vast majority of the American people, *favor doing just that thing—now.*" (Italics added.)

Everyone knows that it is not the function of the Court to pass on the wisdom or unwisdom of legislative acts and it has repeatedly stated that its decisions are not rendered on this basis. But the President seems to conceive any opinion declaring a part of his program unconstitutional as directed against "the judgment of the Congress on its legislative policy" rather than as a decision on whether such act is within the powers granted to Congress by the Constitution. Can there be much doubt that what the President is really saying is that we should change to a legislative form of gov-

*Remarks taken from various radio and other addresses.

ernment? The President is not satisfied with the slow processes incident to procedure under the checks of the Constitution. He believes it to be the best policy: that when a majority of the people, under whatever stress, either of war or depression, or even in normal times, want particular laws, they are entitled to them—to experiment with what may happen. If the results are ill, they will still be satisfactory; for what a majority wishes, it should have. The change is perhaps the more attractive to him under present circumstances because in the popular mind the President is the head of the government and he is still able to obtain from the Congress any laws which he desires. He would be able to concentrate power as much as he will in Washington if the restraints of the Constitution exist no longer. The President, we may admit, if it pleases anyone that it be done, firmly believes that he will lead the people of America into a better land and a happier life; but he knows that he can lead to that land and life of milk and honey only if he is unhampered.

Let me recall further statements of the President. He spoke of the Preamble to the Constitution in this fashion:

"In its Preamble the Constitution states that it was intended to form a more perfect union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action."

The President then adverted to the clause with reference to the laying of taxes. He said:

"But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to Congress the ample, broad powers to levy taxes and provide for the common defense and general welfare of the United States."

We don't need here to discuss what every lawyer knows: that the Preamble and the taxing clauses, with reference to "general welfare," have been limited by other provisions of the Constitution. The President, too, knows that. Can we, then, avoid the necessary conclusion that what the President wishes for us is a legislative form of government, uncontrolled by the checks of the Constitution; that, therefore, hereafter, majorities of Congress shall be regarded as having, with the Executive, the final word as to what laws the people shall have? With a popular and forceful President, the legislative branch will have less influence than he; with a less influential executive, power will center in Congress. That, of course, the President foresees; but he prefers that to the constant check of the Supreme Court. The necessary consequences, of course, will be an all-powerful central government with the rights of the states subordinated to Congress and the Executive, or to one of them, as circumstances at the moment will de-

cree. We shall have no more state laboratories where new ideas can be tried to ascertain their dependability when put into practice. We shall have government from Washington covering a territory of 130 million people. We must inevitably become a government by bureaucracy; so many people and so many square miles can be administered from the Capital in no way.

What further confirmation do we find of the President's regard for a purely legislative form of government? On March 4th he declared:

"Economic freedom for the wage earner, the farmer, and small businessman, will not wait . . . for four years. It will not wait at all."

That declaration is clear enough. It is a statement of what a legislative form of government can do. The President assumes the absolute necessity for what he calls "economic freedom"; an economic freedom of a kind legislated by Congress. If the Legislature were all-powerful, it is clear that whatever legislation the President wants can become law at once and will be the final declaration of the rights, duties, and liabilities of all citizens.

The President, still confirming the theory, offered his analogy of the three-horse team. He declared:

"For as yet there is no definite assurance that the three-horse team of the American system of government will pull together."

The President is a lawyer, an educated man, and familiar with history. The analogy is sound under a legislative form of government; it is utterly contrary to the theory of a constitutional form of government. But what those who wrote the Constitution said, in effect was:

"To have a country and a civilization, to protect ourselves within and from foes without, we must give to the Federal Government certain powers; but even if the government we are creating is a republic, we are well aware that majorities are as autocratic, unfair, and unreasonable as kings. Therefore, we must protect minorities. We, therefore, divide the powers of government between three distinct branches, none of which may control the others. We write these laws in this Constitution, setting up three guardians of our liberties, each to watch and protect against the other two. We are not harnessing a three-horse team to work in unison; we are giving to each horse a different task, and if one does a bad job, the others will repair the negligent work."

It's clear enough that when the going is heavy, three horses might do more quickly any one particular job working in unison; but what the forefathers saw was that, if the three branches worked absolutely together, it was very likely that one would, from time to time, control the action of the others. That way danger lay, and they avoided it.

The President reverted to his metaphor on March 9th, saying:

"Two of the horses are pulling in unison today; the third is not."

I emphasize again that the President knows American history and the theory of our govern-

ment. He knows perfectly well that, far from unity of action being intended, the Constitution provided for the opposite result.

The Chief Executive said, referring to certain legislation, and particularly the AAA:

"You know who assumed the power to veto, and did veto, that program."

We see here again the picture of a legislative form of government. Under such governments there is sometimes given to the Executive the power of veto. The word "veto" is quite aptly applied to legislative matters. It has seldom, with us had any other application. What the Legislature says, so the President believes, is to be conclusive. But the President doesn't suggest that the Legislature work utterly alone; he doesn't offer the surrender of the veto power by the Executive. He derisively uses the word veto as applied to the Supreme Court. Now, each of us is aware that the Supreme Court, in no sense, exercises a veto. What the Court does is to examine the legislation in the light of the Constitution, to ascertain whether or not any of the liberties retained by the people or by the individual states are invaded by the legislation. If they find that to be true, the Court declares the legislation invalid because of the invasion of retained rights. With the legislation, as such, or with its present significance, the Court has no dealing.

The need for haste was emphasized by the President again and again, particularly in that first speech of March 4th. Speed is possible only under a legislative form of government. Court proceedings are not fast. Determination of legal and constitutional questions requires deliberation. The greatest speed is not possible to a constitutional form of government. It was intended to be so; it is desirable. The President said:

"But I defy anyone to read the majority opinion invalidating the AAA and tell us what we can do for agriculture in *this* session of the Congress. . . ."

He further added:

"But I defy anyone to read the opinions concerning the AAA, the Railway Retirement Act, the National Recovery Act, the Guffey Coal Act, and the New York Minimum Wage Law and tell us exactly what, if anything, we can do for the industrial worker in *this* session of the Congress. . . ."

Again he said:

"In this fight, as the lawyers say, time is of the essence." He concluded his speech with eight sentences ending with the word—emphatically spoken—"now." In all that the President says you have the essence of a legislative form of government. Things, in the mind of the President, must be done "now." They cannot wait. We know that, under a constitutional form of government, there can be no assurance that legislation adopted can be effective, *now*. It has always been so understood.

We have ever realized that it is necessary for an impulsive people, a people with the minds of executives, to protect themselves against haste and against ill-considered action. For that reason the constitutional checks and balances were provided.

In his speech on March 4th, the President further said:

"The courts, however, have cast doubts on the *ability of the elected Congress to protect us* against catastrophe by meeting squarely our modern social and economic conditions."

Could there be a declaration of desire for a non-constitutional form of government any clearer than is contained in those words? The President believes that Congress and the Executive alone must have the power, by legislation considered desirable at the moment, to meet current economic and social conditions. The founders of the government believed, on the contrary, that Congress may often adopt ill-advised legislation; that what may seem desirable at the moment may, in the long run, aggravate our ills and deprive us of our liberties. For that reason, the checks provided by the courts were insisted upon. Had the President been a member of the Constitutional Convention, he might have had his way. There were others who believed as he does. But the fact remains that the most of those who adopted the Constitution believed the danger of haste to furnish an infinitely more important consideration than the value of quick legislation, uncontrolled by checks and balances.

The conclusion of the President's last speech confirms all the other statements. He declared:

"I am in favor of action through legislation: first, because I believe that it can be passed at *this* session of the Congress. . . ."

It's all summed up there; the other statements were confirmatory. What the President envisages is a legislative form of government, with an executive veto, but without power in the courts to restrain legislation under the provisions of the Constitution.

Suppose we assume that the President is right in his preference for a purely legislative form of government; that, too, the general welfare clauses of the Constitution might have been so construed, a hundred and fifty years ago, and since, as to permit practically unlimited action in national affairs to the Congress. The fact is, however, that such has not been the view of the people of the United States, of the many judges on the Supreme Court since its inception, and of almost all writers on constitutional law. We have had the constitutional checks on Congress. What is, then, to be done if we shall now have a different form of government and a different Constitution? Amend it and do it in the manner provided in the Constitution itself!

The President in his message of March 9th repeated what he has said before, that "we have only

just begun to fight." Fight against whom? Against a coordinate branch of the government, the judiciary? The issue involved is a change in governmental policy and construction, a lessening of the duties of the Court, a restriction upon the control over legislation. If we are to have this fight, if it is to be a fight to change the division of duties, with what weapons shall the battle be fought? Shall the President use those provided in the Constitution, or extraordinary ones of his own choosing? There is a means provided in the Constitution for changes as to the terms of that instrument. If it is desired that the judiciary have less power and the legislative and executive greater, ways are provided for accomplishing that result. Nor is there any reason why any great delay, so often spoken of, must result. Congress has usually provided, where amendments are proposed, that they be approved by three-fourths of the legislatures of the several states. The Constitution gives another way of doing it. Congress can require that conventions be held, within a stipulated time, in each of the states; to those conventions men can be selected by vote of the people; for what the men selected stand will be known in advance. Whenever a citizen votes he will know that he is voting for Jones who favors the amendment, or for Brown who is opposed to it. Those constitutional conventions voting will decide what the legislatures would decide were the customary practice followed. Surely it cannot be that the President is suggesting that opponents of what he desires will be able to persuade the people, whom the President says he will always trust, to vote against the amendment? Why do we talk of delay when a quick method is available?

We have all read a considerable amount of history. We have observed our citizens nowadays. For one reason or another, we have become an exceedingly nervous, even impressionable people. We become unduly enthusiastic over some things, unwarrantably depressed over others. We go in groups. We dress alike; we talk alike; we insist that people think alike. We are closer to the dangers of oppression, minorities by majorities, than we have ever been before. We have seen experiments tried in many states; experiments that seem contrary to the Constitutions of the states and of the United States. They haven't worked. Speed more often than otherwise is undesirable when one deals with fundamental questions. I think we are in great danger at the moment. I am quite certain that this plan of the Administration to put on the Court men whose views are known in advance, will destroy the efficiency of the Court, destroy the respect people have had for it, and fundamentally alter the theories of government upon which we have heretofore proceeded.

"Power Feeds on Power"

(From Address of U. S. Senator Burke before the State Bar of South Dakota.)

"More than anything else in this country today we need a renewed emphasis upon the fundamental and unchangeable guarantees of the Constitution. We need to continually remind ourselves as well as others that the American system is one of limited governmental powers. Our fathers feared the tyranny of unchecked sovereigns. No less did they dread, and determine to guard against, the lust for power of unrestricted legislatures. They knew that authority continually reaches out for more authority and is never sated,—that power feeds upon power until nothing else will satisfy its constant craving. They wanted government so restricted that all could realize that there are many things that affect the lives of the citizens that no government can properly do, or ought ever to be permitted to try to do. Only thus, they believed, would the sacred rights of the people be safe from encroachment. Thus alone would it be possible, they clearly saw, to develop that spirit of self-reliance, that willingness to depend upon individual initiative, which would make of each American citizen a sovereign in his own right.

"Under that system America has prospered. Dark days came, and in a depression which should have long since been dispelled, troubled citizens began to grope after new Gods. We now turn again to the fundamentals. The Constitution lives. Let America preserve and honor it, let its spirit rule our thinking and our lives, and America may look forward to still better days to come."

Minority Decisions and Reasonable Doubt

(From the same address)

"The argument runs that an act of Congress should not be invalidated on the ground that Congress had exceeded the authority vested in it by the Constitution unless that fact is established beyond a reasonable doubt. And, it is said, if three able justices of the highest court in the land are not satisfied, how can it be claimed that the point is established beyond a reasonable doubt? The answer is that this is a rule that applies alone to the intellect and the conscience of the individual judge. He must satisfy himself beyond a reasonable doubt before he votes to invalidate an act of Congress. Once, however, the individual has reached that conclusion, his duty is clear. If he is joined by a sufficient number of his colleagues to constitute a majority, then the Court is satisfied beyond a reasonable doubt, even though a minority, be it one or four, may not be so fully satisfied as to justify them in joining the majority and rendering a unanimous decision."

THE PRESIDENT'S PROPOSAL TO ADD SIX NEW MEMBERS TO THE SUPREME COURT

Plan Strikes at Independence of Supreme Court and Would Destroy It, and if That Is Done, the Independence of the Other Courts of the Country Would Not Long Survive—Charges Against Supreme Court Brought Forward in Support of Proposal Not Only Have No Basis in Fact But Are Directly Contrary to the Known and Attested Facts—Constitution Would Indeed Be a Rope of Sand without a Supreme Court Clothed with Power to Support It and the Courage and Independence to Do So

BY WARREN OLNEY, JR.
Member of the San Francisco Bar

THE President has proposed that he be given authority to appoint six additional Justices to the Supreme Court of the United States. The avowed purpose is to place on the court a sufficient number of new members favorable to the President's measures to control the decisions of the court as to their constitutionality. The proposal is supported by charges that the court, as presently constituted, is not equal to the discharge of its duties and has usurped a power of veto that does not properly belong to it.

Two things should be made plain to the American people.

The first is that the charges against the court have no basis in fact.

The second is that the proposal strikes at the independence of the courts and upon that independence depend the fundamental liberties of the people, the rights of free speech, a free press, of freedom of religious worship, of freedom from arbitrary arrest; all the fundamental rights comprised within the so-called Bill of Rights and guaranteed by the Constitution.

Even if the charges against the Supreme Court were true, they would afford no reason for destroying its independence. The charges, however, have been broadcast over the nation. They have weakened the respect of the people for our institutions and for the form of government under which we have grown from an aggregation of small and scattered colonies into a great nation, with many difficult and complex problems, and have yet maintained for our citizens the inestimable rights of free men. If those charges are untrue, our people should know it.

The President in his message to Congress presenting his proposal charges the courts with failure to dispatch promptly the business presented to them, with consequent grievous delays in the administration of justice. This is not said of the Supreme Court in so many words, but that court is not ex-

cepted from the charge and the message plainly conveys the idea that it is open to it.

The actual fact, which was certainly known to the President's Attorney General, is just the contrary. For years now the Supreme Court has been fully abreast of its work. Within a few weeks after the record in a case is filed with the court, and within no longer time than is required for the lawyers to prepare for argument, the case is heard. Once heard, it is decided within a few weeks more, unless it is a case of exceptional difficulty. When the court adjourns in May at the end of its annual term, it has disposed of practically every case, except those filed with it in the last days of the term. It would be difficult to conceive of a court dispatching its business more promptly and efficiently. Professor Frankfurter, of the Harvard Law School, reputed the close friend and adviser of the President, has been in the habit of publishing a yearly review of the work of the court. He can hardly be deemed a witness biased in the court's favor. Yet what does he say? In his last review he says this:

"A tradition of prompt disposition of business for which Mr. Chief Justice Taft did so much to lay the foundation appears to have become fixed under his successor. For the sixth successive year the Court at the last term kept abreast of its docket. It is not enough, however, for a court to dispose of a huge volume of litigation with despatch. Especially gratifying is it that a tribunal with the Supreme Court's scope of jurisdiction should do so with increasing attention to those details of administration which are the safeguards of its processes against undue pressure and inadequate deliberation." (Harvard Law Review for November, 1935, p. 69)

Later, in the same Review, he says:

"The Court heard 181 oral arguments, five less than at the previous term and one more than at the 1932 term. For this purpose it was compelled to devote an additional week of the term, or 16 weeks out of 35, to open session. Yet no excessive pressure was apparent; during three of the 16 weeks of session—the last time at the closing one—the Court recessed in the middle of the week for want of cases on the day calendar ready for argument. Adjourning for the term, it left but 96 cases, all of which were too

recently docketed to be prepared for hearing." (P. 71)

Another charge made against the court is that because of the volume of business that confronts it, it declines to hear cases which it should hear. This charge is made specifically by the President. He said in his message to Congress:

"Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 per cent of the cases presented to it by private litigants?"

This charge also is simply contrary to fact and this also must have been known to the President's Attorney General. Every lawyer of experience knows that every court of final appeal is simply bombarded with appeals or the equivalent of appeals and that in the very great majority of them an appeal should not be taken or allowed since they are either trivial or there is no substantial ground for questioning the correctness of the decision made in the court below. One need not be a lawyer to appreciate that such a court as the Supreme Court of the United States should not have its time occupied by appeals in trivial cases or in cases presenting no substantial ground for reversing the judgment of the lower court. Its time should be given only to cases presenting questions both of large importance and of doubt.

Appreciating this, and for the very purpose of weeding out cases which did not justly require consideration by the Supreme Court, Congress itself provided in 1925 that when a cause had been tried and decided by a trial court and then had been appealed to a Circuit Court of Appeals, of which there are ten, and decided again by the latter, a further appeal or its equivalent to the Supreme Court should not be permitted unless it was first made to appear to that court that the cause presented a question of importance and doubt. It is to the process of thus weeding out in the manner provided by Congress of causes already decided by one appeal court and which did not justify a further appeal to the Supreme Court that the President refers in his message when he says:

"But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 per cent of the cases presented to it by private litigants?"

The fact, as every lawyer familiar with the working of the court knows, is that every applica-

tion to the Supreme Court to take over a case after it has been decided by a Circuit Court of Appeals is carefully considered by the full court and is granted if even a small minority of the court believes the case presents a question of such importance and doubt as to justify its consideration. It simply is not true that the court declines appeals out of the sheer necessity of keeping up with its business. Certainly if there were any such serious evil in the performance of its duties by the court as the refusal to hear cases which justice required should be heard, it would not have escaped the attention of Professor Frankfurter, yet he makes no mention of it.

The most serious charge made against the Supreme Court is that it has usurped the power to "veto", as it is said, laws regularly passed by the Legislature and approved by the Executive. The charge refers to the power exercised by the Supreme Court and by the courts generally to hold invalid and to refuse to enforce a law that conflicts with the Constitution.

The fact is that the exercise of this power is neither a usurpation nor a veto, and this also was known, or should have been known, to the President's Attorney General. It is not a usurpation for the simple reason that when the Constitution was adopted, it was intended that the Supreme Court, and, under it, the inferior courts, should have this very power. The history of the subject is given at length in the little volume of Charles Warren, "Congress, the Constitution and the Supreme Court," and that history shows these things:

First, that prior to the adoption of the Constitution the courts in a number of the states had already refused to enforce laws transgressing the state constitutions, holding such laws invalid, and that these decisions had been received with general approbation as necessary to protect the people in the liberties for which they were striving.

Second, that this power in the courts was discussed in the Constitutional Convention and recognized both as one properly belonging to the courts in the exercise of their judicial function and as one which it was essential they should have for the protection of the liberties of the people; and

Third, that the very first Congress following the Constitutional Convention, a Congress made up largely of the former members of the Convention and which certainly knew just what was intended by the Convention in this respect, itself passed almost immediately the Judiciary Act of 1789, organizing the system of federal courts, and in this act recognized the existence of this power in the courts.

Moreover, in the first Congress, and in the Congresses which immediately followed it, the constitutionality of bills presented for passage was the subject of constant discussion and it was always

taken for granted, and repeatedly stated without contradiction, that the final decision as to the constitutionality of a law was for the courts.

It is said that the Constitution does not expressly give the courts this power. This is pure quibbling. The Constitution provides in so many words "This Constitution . . . shall be the *Supreme Law of the Land*" and gives to the Supreme Court and such inferior courts as Congress may establish the full judicial power of the United States, without any limitation whatever upon it. What does the provision mean, that the "Constitution shall be the Supreme Law of the Land," if it does not mean that if Congress or a state legislature or any other legislative body passes a law in conflict with the Constitution, the Constitution and not such law shall prevail? And if the Constitution is to prevail and a case comes before the court in which the rights of the parties turn upon whether the Constitution shall prevail or a law, say, of Congress, that is in conflict with it, how can the court in performing its judicial duty in deciding the case do otherwise than decide it in accord with the Constitution and refuse to give the effect to the law in conflict with it and hold such law invalid? *And this, and only this, is all that the Supreme Court has ever done.*

Truly, to every one of those who, with an assumption of knowledge, say to our people that the Supreme Court has usurped the power to declare acts of Congress invalid when it was not intended by the makers of the Constitution that it should have that power, there may be replied what Lincoln replied to Stephen A. Douglas:

"He has no right to mislead others, who have less access to history and less leisure to study it, into the false belief that our fathers who framed the Government under which we live were of the same opinion, thus substituting falsehood and deception for truthful evidence and fair argument."

Nor is the charge that the Supreme Court vetoes acts of Congress any less absurd or misleading. How the Attorney General of the United States, if he were consulted in advance, permitted the President to make such a charge it is not possible to say. The court has never vetoed a law, or even intimated that it had the power to do so. All that it has ever done or ever claimed the right to do has been that when a case came before it in which the rights of the parties turned on whether the Constitution or an act of Congress or other legislative body in conflict with it was the law of the land, it has decided the case in accordance with the Constitution, refusing to apply the conflicting law as of no effect and invalid. This is the plain duty of the courts and beyond this they, and more particularly the Supreme Court, have been exceedingly careful not to go.

The court has never assumed to pass upon the policy of a law or its wisdom or unwisdom. It concerns itself only with the single question, Is or is

not the legislative enactment upon which one of the parties before it relies in conflict with the Constitution? The rule which has always governed it was thus stated in the court's opinion in the recent A.A.A. decision.

"We approach its decision (a decision on the constitutionality of an act of Congress) with a sense of our grave responsibility to render judgment in accordance with the principles established for the governance of all three branches of the Government.

"There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

But untrue as are the attacks upon the Supreme Court and mischievous as are the consequences of their being broadcast to the American people, the danger to the nation by reason of them is not to be compared with the danger inherent in the proposal to add presently six more members to that court. The danger does not lie in the mere addition of six more members. It lies in the avowed purpose for which the additional members are to be appointed. That purpose is to obtain hereafter decisions satisfactory to the President and more particularly, decisions which will uphold the constitutionality of the measures of social change and reform which he advocates, both those already adopted by Congress and heretofore held to be unconstitutional, and those which he may hereafter propose.

What the social merits or demerits of those measures may be does not change the peril inherent in a proposal that is, in its essence, one to add to the present Justices a sufficient number to control the court for the purpose of insuring decisions by it overturning decisions already made, and upholding as constitutional laws not yet proposed and whose character is as yet unknown. Assuming that each and all of the measures desired by the President represent changes that should be had in our social system and crediting him with the utmost purity of motive, the advantages of those changes are not to be compared with the value of preserving to the American people the independence of their courts and with that independence the only

means they have of protecting their fundamental liberties.

The same answer is to be made to those who say that the majority of the present members of the court are old fashioned in their ideas and younger and more forward-looking men are needed. Even if this were true, it is something that will remedy itself. The older members of the court are certain in the course of nature to be succeeded by others in a short space of time, and surely the advantage of anticipating by a short period an inevitable change in personnel does not outweigh in the balance the destruction of the independence of the courts and the rendering futile appeals to them by citizens for protection against the invasion of their liberties guaranteed by the Constitution. The one is but a passing phase. The other puts in hazard the fruit of centuries of struggle for freedom.

Likewise, the character of the President's proposal is not effected in the slightest by the question of whether the recent decisions of the Supreme Court, holding unconstitutional some of the measures adopted by Congress at his instance, were right or wrong. The difference is solely one of honest opinion. No charge is made, and no charge can be made with even a semblance of justification, that those decisions were not honestly made and do not reflect the honest opinions of the justices who made them. This being the fact, to appoint additional justices with the avowed purpose of obtaining decisions to the opposite effect, is to pack the court to obtain decisions satisfactory to the executive power and to destroy it as a tribunal whose decisions are made according to the right and wrong of the matter as its judges see it.

It is said that past Presidents have appointed to the Supreme Court men of their political party and known to be in sympathy with their views. But it is one thing for a President to appoint to the bench a man of the same general political and social outlook as himself and another thing to announce in advance to the man appointed that he is appointed for the purpose of having him vote, when he is once seated on the bench, in a particular way. If the President's proposal is adopted, no man can be appointed by him to the Supreme Court who will not know when he accepts the appointment that he is expected "to deliver the goods."

Such, then, is the nature of the President's proposal. It is one that strikes at the independence of the Supreme Court and would destroy it. And if that independence is destroyed, the independence of the other courts of the country cannot long survive.

The struggle for human liberty has revolved around the struggle for independent courts. The most important concession wrung from the King by Magna Charta was that all men should be equal before the law and the rights of every man should be protected by courts that were not mere append-

ages of the King. The Court of Star Chamber, infamous for its tyranny, was overthrown because it was made up of puppets of the King and did his will. When the American Constitution was presented for adoption, the memory of the tyranny to which the people had been subjected was still fresh in their minds. They insisted that there be included in the new Constitution a bill of rights that would guarantee them freedom from arbitrary arrest, freedom of speech, freedom of the press, freedom of religious worship, freedom of assemblage, freedom from unreasonable search and seizure, freedom from conviction of crime except on a fair trial by jury; freedom, in short, to exercise all those rights which make up, in the burning words of the Declaration of Independence, the "inalienable rights to life, liberty and the pursuit of happiness."

And why did the people insist upon a guaranty of these rights being inserted in the Constitution? It was that they should become a part of the "Supreme Law of the Land" and as such, be protected by the courts against violation by either the executive or legislative branches of the Government.

Jefferson wrote a friend:

"In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the Judiciary. This is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity."

Patrick Henry said:

"The Judiciary are the sole protection against a tyrannical execution of the laws. They (Congress) cannot depart from the Constitution; and their laws in opposition would be void."

Madison, presenting to the First Congress the amendments incorporating the Bill of Rights in the Constitution, said:

"If they (the rights specified in the Bill of Rights) were incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights."

To this statement by Madison there was not a word of protest or denial, and upon that explanation of why it was sought to amend the Constitution by inserting in it the Bill of Rights, the necessary amendments were passed by the First Congress and ratified by the people.

The experience of other peoples as compared with our own demonstrates that the belief of the fathers of the Constitution was well founded that it was upon an independent Judiciary that they must rely to protect their liberties. The difference is striking. When the Spanish American colonies broke away from their mother country and became republics, there was hardly one whose constitution did not contain guaranties of the more important, if not all, of the rights guaranteed by our Constitu-

tion. But in few of those republics, indeed, have those rights existed in fact. And the reason is the very simple one that the courts of those countries have not been independent and there has been no tribunal to which the individual citizen could appeal for the protection of his liberties. Look around the world today and in how few countries do the rights of free speech, or of assemblage, to enumerate but two, exist. In every country where they do exist, there exist independent courts by which they may be enforced.

Compare this with our own experience. These rights exist here in fact as well as in name and have so existed ever since we became a nation. We are so accustomed to them that it does not occur to us that serious threat against them can be made. Yet the fact is that time and again both the executive and the legislative powers have attempted to violate them, and it is only because the Supreme Court, strong in its independence, has consistently resisted such aggressions that those rights exist today. Three times Congress passed Bills of Attainder, although such bills are expressly prohibited by the Constitution and were one of the tyrannies against which the Colonies, rebelling from England, bitterly complained. At least ten times since as late as 1867, Congress has sought to violate rights of the citizen guaranteed by the Constitution. As instances, it has tried to authorize illegal searches and seizures of private papers. It has tried to authorize a second trial of a man on a charge on which he had already been tried and acquitted. It has attempted to authorize imprisonment at hard labor, without a presentment or indictment by a grand jury. It has attempted to make a crime out of an act which was not a crime when it was committed so that a man might be imprisoned for doing something which at the time it was lawful for him to do.

The legislatures of the various states have repeatedly done the same thing, only more often and with less worthy motives and less regard for the rights of the individual citizen. It is necessary only to recall that the legislature of Oregon sought very recently to violate the right of religious freedom and it was only the Supreme Court of the United States that prevented the attempt being successful; that the legislature of Louisiana, at the bidding of the late Huey Long, sought to put out of business all the newspapers of the state that opposed him, and again, that it was only the Supreme Court of the United States that saved an independent press to the people of Louisiana.

We must not forget that if the courts may not have the independence and the power to protect the citizen against the invasion of his rights under the ostensible authority of an invalid act of Congress, neither may they protect him against such invasion under the authority of an act of a state legislature, or of a town council, or of any other body clothed

with power to adopt a law or pass an ordinance, no matter how arbitrary and plainly violative of the most elementary rights such law or ordinance may be. Such acts are all of the same character as against the guarantees of the Constitution, and if the courts are rendered impotent to protect against one, they will be impotent to protect against any.

Always, against attempts to violate the rights guaranteed the citizen, whether by acts of Congress, by acts of a state legislature, by ordinance of a city council or by whatever authority, the Supreme Court has extended its protection to the humblest citizen. Always it has been the final refuge for the oppressed. Its consistent attitude was thus expressed by it:

"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."—(*Yick Wo v. Hopkins*, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064.)

The leaders of Organized Labor have declared themselves in favor of the President's proposal. They know not what they do. They represent the laboring man, individually without large means or influence, as opposed to the employing class, made up of corporations and individuals with means and influence. Their hope for the future of labor lies in the strength of their organizations. For their organizations two things are essential, free speech and the right of assemblage. If labor cannot exercise these rights it is lost. It is quite within the realm of possibility that in these unsettled and quickly changing times there may come into office hereafter a President and a Congress representing a point of view wholly different from that of labor. If this should happen and the Supreme Court be what it is now and what it has always been until now, labor would still be secure in its fundamental rights to persuade by speech and writing, and to assemble in unions. But if the independence of the court is taken away, labor will be at the mercy of a President and Congress who choose to pass a law forbidding the persuasion of men to join a union or the assembling of laboring men to consult for their common interest.

It is no answer to this to say that such a thing could not happen in this country. It has happened elsewhere in countries no less civilized than ours. It has happened in Germany and Italy. The last act of Huey Long, in his reach for arbitrary and irresponsible power in Louisiana, was to pack the

(Continued on page 264)

THE PRESIDENT'S SUPREME COURT PLAN

Facts Tending to Throw Some Doubt on the Constitutionality of the Measure—Old Age Provisions of the Bill Analyzed—Real Purpose of the Bill—Who Are the Supporters of the President's Plan?—Effect Which the Measure, if Enacted into Law, May Have upon Decisions of the Supreme Court not Involving New Deal Legislation—Are Our Liberties and Religious Freedom in Danger?—Are the People Willing to Entrust the Final Decision of Such Questions to Judges Selected Primarily for Their Paternalistic Views?—Personal Reassurances of the President Insufficient.

BY LOUIS A. LECHER
Member of the Milwaukee Bar

✓ **T**HIS paper is not intended as an emotional appeal nor an historic review, but as an analysis of some of the features of the President's plan with respect to the Supreme Court.

THE CONSTITUTIONALITY OF THE PROPOSED LAW

In spite of the assertion of its proponents to the contrary, I venture to suggest the following facts as tending to throw some doubt upon the constitutionality of the measure:

The power of Congress to fix, from time to time, the number of judges constituting the Supreme Court is conceded. It should also be generally agreed that Congress is the *only* body which has that power. The difficulty I find with the proposed measure is that it does *not* fix the number of judges who shall constitute the Court, either expressly or by reference to any existing fact. Under this Bill the Court may continue to consist of nine members or be raised to fifteen members or to any number between nine and fifteen, depending not on anything which Congress or the President may hereafter do nor on any event which is certain to happen, but on what any one or more or all of the present Justices over seventy years of age may do within a designated time after the effective date of the law. Congress does not *determine* that the Court shall be larger than nine at *any* time. The Bill provides that for every present Justice over seventy who does not resign or retire within the period specified, one additional member shall be added, ostensibly to take part of the load off the shoulders of these "aged" men. But if, by reason of their refusal to resign or retire, the size of the Court is increased, *it continues* at the increased size permanently thereafter, even after the "aged and infirm" Justices have either resigned or died and so removed the "evil," to correct which the proposed legislation is said to be intended. It is, therefore, the action or failure of action, within the time limited, by the six Justices in question which permanently determines the size of the Court. The failure of the six Justices in question so to resign or retire,—

thereby permanently increasing the number of Judges constituting the Court to fifteen, the *maximum* size limit of the Court,—effectively prevents the supplanting of the new appointees, when they in turn reach the age of seventy, thereby thwarting the very purpose of the proposed enactment.

It is interesting to contemplate whether this Bill, which makes the permanent size of the Court dependent upon the voluntary act, or failure to act, of the six Justices in question, constitutes an unconstitutional attempt to delegate legislative authority to the very six Justices who are accused by the President of usurping legislative powers.

THE OLD AGE PROVISIONS OF THE BILL ANALYZED

The Bill is ostensibly aimed at curing an alleged evil due to the inability of the Justices over seventy years of age, by reason of their age, to perform properly the functions of their high offices and to interpret "correctly" the Constitution "according to the popular will."

If it is inimical to the public welfare to have men over seventy continue to function as Justices of the Supreme Court and this Bill is intended to correct that supposed evil, suitable provisions to accomplish that result should be found in the Bill. Where are they? It is true that the Bill authorizes the appointment of additional Justices if those over seventy now on the bench do not resign or retire within the specified period, but the Bill sets no age limit for the proposed new appointees, so men now seventy or almost seventy could legally be appointed for the Justices who refuse to resign or retire. Furthermore, the Bill applies only to Justices over seventy who have served ten years, so an additional Justice cannot hereafter be appointed when one of the new appointees in turn reaches the age of seventy years, until such appointee has himself served ten years. Under the Bill, if none of the six Justices now over seventy resign or retire, as provided, the size of the Supreme Court is permanently increased to fifteen, even though all of the Justices in

office at any time in the future are well *under* seventy years of age, and the reason for "old age assistance," therefore, does not exist. The Bill also limits the *maximum* size of the Court to fifteen members. Therefore, if the present six Justices now over seventy "ordain" (by not resigning or retiring) that the Court shall consist of fifteen members, then it will permanently consist of fifteen members, even though every one of them gets to be *over* seventy years of age. These incongruities in the present Bill could, of course, be readily cured by amendment and here are pointed out only as tending to impugn the sincerity of the assertion by the President's advisers that the Bill is intended to replace the mental infirmities of age with the vigor and responsiveness of youth.

WHY DOES THE BILL PERMANENTLY INCREASE THE SIZE OF THE COURT?

We have for some years had a statute (U. S. Code Annotated, Title 28, §375) authorizing the President, in the event any Circuit or District Judge over seventy, who has held a commission or commissions at least ten years, does not resign or retire, to appoint an additional Circuit or District Judge if the President finds any such Judge unable efficiently to discharge the duties of his office; but that statute provides that, upon the death, resignation, or retirement of any Circuit or District Judge so entitled to resign, following the appointment of any such additional Judge, the vacancy caused by such death, resignation, or retirement shall not be filled. Why is that principle departed from in the present Bill?

It is true that present members of Congress are, under the Constitution, ineligible to appointment to any of the *new* judgeships created by the Bill and that this prohibition does not apply with respect to vacancies occurring in existing judgeships. Therefore, the bill in its present form does offer to present members of Congress opportunity for appointment to the Supreme Court whenever any of the present Justices die, resign, or retire, whether that be before or after additional Judges have been appointed. Whatever may have been the motive of the President's advisers in so framing the Bill as to provide this opening to senators and representatives who will vote on the Bill, it would require an utter lack of confidence in their integrity to assume that members of Congress with judicial ambitions would vote for a measure they considered vicious merely because the Bill also provides a means for circumventing the constitutional prohibition against their appointment to the newly created judgeships.

REAL PURPOSE OF THE BILL

It is now substantially conceded by the President and other advocates of the proposed measure that its real purpose is not to compensate for the infirmities of age, but to secure the *present* appointment of a sufficient number of new Justices to the Supreme Court to insure that the New Deal legislation desired by the President will be sustained as to constitutionality.

Lawyers shudder at so bold an attempt to "pack the Court." It is openly admitted that the "right men" will be appointed. It is not even suggested that the President will appoint a few conservatives or a few lawyers of recognized standing and ability whose views on the constitutionality of New Deal legislation are not known in advance.

WHO ARE THE SUPPORTERS OF THE PRESIDENT'S PLAN?

In addition to those who are supporting the President's proposal out of blind party loyalty and a few lawyers whose endorsement thereof may be tainted by personal judicial ambitions, there are concededly many thousands of our citizens, including a substantial number of lawyers (but a very small minority of the bar), who are in good faith supporting this legislation, but for varying reasons.

(a) There are those who believe that the Supreme Court should not have the power to nullify any act of Congress. They say that when a majority of the Congress and the President have approved a law, it represents the will of the people and should not be set aside by "nine men," forgetting that the Constitution is intended for the protection of minorities against the usurpations of the majority. They believe that the Congress and the President are as well able to judge the constitutionality of a measure as is the Supreme Court. Few lawyers can be found in this group. Lawyers realize that members of Congress, however able and however sincere in their desire to uphold the Constitution, are unable properly and impartially to determine constitutional questions. The number and size of bills considered by Congress make it a physical impossibility for its members even to read them, much less study their constitutionality; members of Congress are subject to pressure by the President; patronage is a powerful lever affecting their action, as is the party whip, the pressure of "blocs," the personal solicitations, pleadings, and threats of individuals, groups, lobbyists, and others, often in secret conferences; all of these prevent a judicial consideration by Congress of the constitutionality of legislation.

Much of the unconstitutional legislation enacted by Congress attempts to create additional Federal power by further restricting or entirely usurping the powers of the separate States over the matters involved. Most senators and congressmen will themselves readily admit that they could not be entirely impartial judges in determining the constitutionality of their own action in limiting or depriving the States of rights reserved to them under the Constitution, and certainly the individual States would not be willing to recognize their adversary in the legislation under attack as a fair judge to decide its constitutionality. Furthermore, only a majority vote is required to enact legislation and a majority of those voting may be a minority of the House or of the Senate. A determination of constitutionality by Congress might, therefore, easily be a

determination by an actual minority. Then, the individual members of Congress may be, and frequently are, elected by a plurality vote which is less than a majority; neither is a candidate for President required to have a majority of the popular vote to be elected, and the popular vote is always the aggregate vote of only a fraction of the entire population entitled to vote.

Neither would lawyers approve of the Executive being the determining factor as to the constitutionality of legislation which gives him additional power.

(b) There is another group who object to 5 to 4 decisions. It has been repeatedly pointed out that a Court of 15 does not correct that evil, if it is an evil. Those who object to 5 to 4 decisions say that one man should not be permitted to thwart the will of the people as represented by an act of Congress. Disregarding, for the moment, the fact that it is the duty of the Court to construe laws as to constitutionality without regard to the *wisdom* or *desirability* of the legislation, but purely with regard to the *power* of Congress to enact it, the fact remains that the *original enactment* of the legislation is upon a majority vote basis, so that one man in Congress can as well cast the deciding vote in the original enactment of a measure as can one member of the Court, after its enactment, cast the deciding vote with respect to its constitutionality.

(c) There are those among the supporters of this Bill who favor the change because they say the present Supreme Court places property rights above human rights. The masterful answer to this criticism recently made by Senator Borah should be a sufficient reply to this criticism.

(d) There are those who base their criticism of the present Court upon the fact that the Court has declared a so-called "twilight zone" in which both the State and the Federal Government are powerless to act. We should be eternally grateful that the Constitution does create a twilight zone which protects the rights of the humblest citizen against invasion by either Federal or State government. The right of trial by jury, religious liberty, personal freedom and security, freedom of speech and of the press are all in the twilight zone; also the right of private property. This latter is the right to which objection is most frequently made. I invite the attention of this group of objectors to the decision of the Supreme Court of the United States in *Louisville Bank v. Radford*, 295 U. S. 555, in which Mr. Justice Brandeis delivered the *unanimous* opinion of the Court, holding the *Federal Frazier-Lemke Act* unconstitutional as violative of property rights under the Constitution. It is significant that Mr. Justice Brandeis, in his opinion in that case, calls attention to the fact that in the case of *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56, the Supreme Court held unconstitutional provisions of *State* (italics mine) legislation in some respects comparable to the *Frazier-Lemke Act*. The opinion in the case of *Worthen Co. v. Kavanaugh*, referred to by Mr. Justice Brandeis, was written by Mr. Justice Cardozo and is also a *unanimous*

opinion. It is also significant that in the opinion of Mr. Justice Brandeis, above referred to, he calls attention to the fact that the Federal Court for Western Kentucky and the Circuit Court of Appeals for the Sixth Circuit had held the *Frazier-Lemke Act* *valid* and that it had been sustained elsewhere. In spite of this fact, the Supreme Court unanimously held it unconstitutional.

Do those whose objections are based upon the twilight zone as applied to property rights feel that the adding of six additional Justices to the Court will reverse the rules laid down in the opinions by Mr. Justice Brandeis and Mr. Justice Cardozo, *supra*, and, if so, how? Do they hope that the threat implied in the present proposed increase in the size of the Court will be effective in changing the views of enough of the present members of the Court to reverse the previous decisions or are they comforted by the fact that if this is not the case, the same process can be again used to further increase the size of the Court?

(e) Another group favoring the President's plan does so because the present Court has held that the Federal Government has no authority under the Constitution to regulate wages and hours of employees in intrastate commerce.

The Supreme Court, in the case of *Schechter Corp. v. United States*, 295 U. S. 495, in a *unanimous* decision, held that *such power does not exist*. The Chief Justice, delivering the opinion of the Court, said (p.549):

"If the Federal Government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost would likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power.

* *

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it."

And again on p. 550:

"Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution."

Mr. Justice Cardozo, in his concurring opinion (in which Mr. Justice Stone joined) in that case, says (p.554):

"If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void unless authority to adopt it is included in the grant of power 'to regulate

commerce with foreign nations and among the several States." United States Constitution, Art. I, §8, Clause 3.

"I find no authority in the grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendant's business. As to this feature of the case, little can be added to the opinion of the Court."

How do those who favor the authority of Congress to regulate wages and hours hope, by the appointment of six additional Justices, to secure a reversal of the *Schechter Case*?

(f) There are also those who favor the pending legislation because they are opposed to child labor and believe Congress should have a right to regulate it, and they, together with the President, call attention to the difficulty encountered in securing the approval by the required number of States of the Child Labor Amendment.

The American Bar Association has for many years been on record in opposition to the Child Labor Amendment in the form submitted and believes there is sound reason for the refusal of the States to adopt it. If Congress, without an amendment to the Constitution, is held to have the power to regulate or prohibit child labor, a Supreme Court finding that that power now exists might hold that the extent of the exercise of the power is within the sole discretion of Congress and child labor laws even more objectionable than those which would be permitted under the pending amendment might also be sustained.

In the Child Labor Tax Case, *Bailey v. Drexel Furn. Co.*, 259 U. S. 20, the Supreme Court held that the regulation of the employment of child labor in the States is completely the business of the State Government under the Federal Constitution. There was only one dissent from that decision, namely, Mr. Justice John H. Clarke. Mr. Justice Brandeis did not dissent.

Mr. Justice Brandeis also concurred in the unanimous decision of the Supreme Court in *Hill v. Wallace*, decided at the same term, 259 U. S. 44, in which Mr. Chief Justice Taft, in his opinion, states (p.67):

"Our decision, just announced, in the Child Labor Tax Case, *ante*, 20, involving the constitutional validity of the Child Labor Tax Law, completely covers this case."

How do those who favor the President's Bill because they believe the present Constitution authorizes Congress to regulate or prohibit child labor, hope thereby to get a reversal by the Supreme Court of its previous decisions on that subject?

In my opinion, if any of the foregoing objectives can be achieved without amendment of the Constitution, it must be done by so drafting legislation that it will survive the constitutional test (and who will say that the possibilities have been exhausted), and not by packing the Court.

HOW ABOUT OTHER THAN "NEW DEAL" DECISIONS?

Have those who favor the President's proposal, because they disagree with one or more of the decisions of the present Court holding New Deal legislation unconstitutional, given proper consideration to *the effect*

which this Bill, if enacted into law, may have upon decisions of the Supreme Court not involving New Deal legislation? Lawyers realize more fully than laymen the great number of intricate and important questions, other than constitutional questions, upon which the Supreme Court passes final judgment. Only seventy-seven laws have been declared unconstitutional by the Supreme Court in the one hundred and fifty years of its existence and in only eleven of these seventy-seven decisions were there as many as four dissenting votes. The President's plan for "hand picked" judges is intended only to insure that the New Deal legislation advocated by the President will be held valid.

The Supreme Court passes on many questions; among them are the constitutionality of State statutes; the interpretation of Federal statutes; the validity and interpretation of the thousands of regulations (which, if valid, have the force of law) issued by the many commissions and other administrative bodies of the Federal Government; questions involving personal liberty, religious freedom, liberty of speech and of the press, trial by jury, searches and seizures, taxes, and many other questions intimately connected with the liberty and well-being of our citizens. Are the American people willing to take the chances involved in having questions so vitally affecting their liberties and welfare finally adjudicated by judges primarily selected because of their known views on certain legislation desired by the President? Will not at least some of those selected by him have extreme nationalistic views? Will not at least some of them have strong paternalistic tendencies? Will not at least some of them be chosen because of their known views in favor of a managed economy and a totalitarian state?

What would happen to State rights, for example, if the President were to appoint the Hon. John Dickinson, who, in an address delivered in New York November 14, 1935, at the annual meeting of the Academy of Political Science of Columbia University, while he was Assistant Attorney General of the United States, made this statement respecting State rights:

"The state governments are guaranteed their position, their powers, immunities, and freedom from outside interference so far as it extends, by the Constitution itself, and considerations of desirability and expediency must of course yield always to constitutional right.

"In this connection, however, there is an important consideration which is frequently overlooked in discussing the position of the states under the Constitution. It is that the Constitution is the source, as it is by all admitted to be the measure, of state rights; *that the states derive whatever powers and immunities they possess from the text of the Constitution.* This fact is frequently obscured because the powers of the states are expressed in the Constitution in the form of a reservation while the powers of the federal government, on the contrary, are expressed in the form of a grant. It is further obscured by the tendency to think of the Constitution as created by and drawing its authority from the states." (Italics mine.)

Does this view represent the "modern" interpretation of the Constitution desired by the President?

ARE OUR LIBERTIES AND RELIGIOUS FREEDOM IN DANGER?

The President has tried to reassure the American people as to the harmlessness of his proposal by the statement that his record as Governor and President should be sufficient to allay the fears of those who believe that their liberties are in danger.

Has the President overlooked the fact that in the *Schechter Case*, *supra*, the question before the Court was whether the defendants had been rightfully convicted of criminal offenses consisting of violations of the live poultry code promulgated under the NRA; that they had been convicted in the District Court and that the conviction on a conspiracy count and on sixteen counts for violation of the code had been sustained by the Circuit Court of Appeals, and that the Supreme Court reversed the judgment of conviction; that the "crimes" of which the defendants had been convicted consisted in permitting customers, when buying poultry, to make selections of individual chickens taken from particular coops and half coops instead of requiring them to take the chickens as they were drawn out of the coop? Has the President forgotten that when the Supreme Court reversed the conviction of the defendants on these criminal charges, the President was so indignant that he made his now historic reference to a "horse and buggy" Constitution?

Has the President forgotten that the Congress enacted and that he approved the so-called Potato Act (repealed after the AAA was declared unconstitutional) which went so far as to prohibit "the transfer of the right to consume potatoes" by the producer of such potatoes (even though they were raised in his own back yard) to any one other than a member of his household or the household of a person employed in the farm operations of such producer, unless any such potatoes (or the carton containing them) in excess of the producer's quota (if he had any quota) contained tax stamps at the rate of 75c per hundred pounds of potatoes, and which made any producer of potatoes, who wilfully failed or refused to pay the tax or who violated any other provision of the Act, guilty of a criminal offense punishable by fine or imprisonment? Does the President believe that a regulation which provides that the serving of potatoes to guests at a Sunday dinner shall constitute a criminal offense if not done "according to statute and regulations issued pursuant thereto" does not deprive our people of their liberties?

Has the President forgotten that while the NRA and the AAA and other New Deal legislation existed, hundreds of code authorities and other commissions and administrative bodies had authority under those laws to establish rules and regulations which had the force of law and the violation of which subjected the offender to criminal penalties, and that thousands of our people

were punished for violation of such regulations; that these regulations were many thousands in number, were never published, and that many of them could not be found when demanded, not even by the body which issued the regulations, and that our citizens were subjected to the possibility of fine or imprisonment for violation of those unknown regulations?

Has the President forgotten that several States have in the past enacted legislation interfering with the right of parents to educate their children in parochial schools and that the action of the Supreme Court was required to invalidate such legislation?

Has the President forgotten that during the frenzy generated by the World War, legislation was enacted by Congress and approved by the then chief executive, under which thousands of our citizens were suspected, many hundreds arrested and convicted on charges of which they were not in fact guilty?

Has the President forgotten that during the prohibition era over-enthusiastic law enforcement officials, encouraged by the preachings of fanatical reformers, arrested and, in some cases, killed men suspected of violation of the prohibition laws, which suspicions subsequently proved to be unfounded, and that there were very few convictions for such unlawful killings?

Has the President forgotten the frequent attacks on liberty of the press by legislation and by the acts of administrative officials claiming authority under such legislation?

These things have frequently occurred in the past; they will repeatedly occur in the future. Are the people of the United States willing to entrust the final decision of those questions to judges selected primarily for their known extreme nationalistic or paternalistic views?

It seems inconceivable that our people should want to impair the absolute impartiality and freedom from outside influences of the present Court. No pressure by the Executive, no consideration of patronage, no private interviews now affect the judgment of the Court. Shall that all be changed?

President Roosevelt has made this question a personal issue. He enjoys a great personal popularity. It could well be said of him what was said of Thomas Jefferson by Chief Justice Marshall in a letter to Justice Story:

"His great power is over the mass of the people, and this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, and he is unfriendly to the source from which it flows. He looks, of course, with ill will at an independent judiciary. That in a free country with a written constitution any intelligent man should wish a dependent judiciary, or should think that the constitution is not a law for the court as well as for the legislature would astonish me, if I had not learnt from observation that with many men the judgment is completely controlled by the passions." (Beveridge's Life of John Marshall, Vol. 4, p. 363.)

PLAIN SPEAKING

THE PRESIDENT'S CASE AGAINST THE SUPREME COURT

BY GEORGE WHARTON PEPPER
Member of the Philadelphia Bar

THE President's proposal assumes the existence of an evil and advocates a surgical operation to cure it. This, from his point of view, is good strategy. Obviously he desires to confine the controversy to a discussion of rival remedies. If nobody can think of one better than his, he wins; and victory perhaps would not be unpalatable to him.

I, however, challenge his assumption and assert that in the case of the Supreme Court there is no evil to be cured.

If I can make good this assertion then the pending proposal will be seen to be nothing but an untried remedy for an imaginary mischief. If so, the way will be open for my second proposition, namely, that the proposal is not just a harmless superfluity but is itself a dangerous mischief-maker.

I.

The burden of establishing the existence of an evil to be cured rests upon the man who asserts it. In order to discharge that burden he must show:—

1. That some or all of the nine Justices now upon the Court lack integrity or are undeserving of public respect; or

2. That they are not in fact disposing of the business of the Court with thoroughness and promptness; or

3. That the way in which the business is disposed of is not in general satisfactory to litigants; or

4. That the way in which particular cases have been decided in the recent past is ascribable only to the perversity or unintelligence of the Justices and not to a permissible difference of opinion respecting the meaning of the Constitution and the nature of our federal system.

In no one of these respects can it be contended even with plausibility that the President has made out his case.

1. The discussion of the so-called reform has subserved at least one useful purpose; it has given the people of the United States an opportunity to express their entire confidence in the character and integrity of the nine Justices who at present compose the Court. No responsible person, however violent a critic of the Court he may be, has so far made any assertion that our Supreme Court Justices are anything but public servants deserving of the highest respect.

This cannot be said of Congress or of the President. Every well informed reader of this article sus-

pects that if there could be a secret ballot in House and Senate the President's proposal would be overwhelmingly defeated. It is being openly and emphatically charged that the most intense political pressure is being brought to bear by the Administration upon members of the House and Senate to compel support of the President's proposal, irrespective of its merits or demerits. There can be no other interpretation of the sinister utterances of Mr. Farley. This is a subtle form of coercion which is the moral equivalent of bribery. It is discreditable alike to those who exert the pressure and to those who yield to it. Nobody has ever dared to make any such suggestion in the case of a Justice of the Supreme Court. As to the President, he has been repeatedly and emphatically charged with breach of party pledges and the concealment from the electorate of his policies and purposes when it was his obvious duty to speak out like a man. One of the items which should be inserted in the President's next Thanksgiving Day proclamation, as a thing for which the American people should be profoundly grateful, is the unimpeachable integrity of the Justices of the Supreme Court.

2. The President appears to have relied on the Attorney General to sustain the charge that the docket of the Court is congested and the implication that more, or other, Justices are needed to do the Court's work. The devastating reply made by the Chief Justice to this charge so completely disposes of the Attorney General's contention that an apology for making it would not be out of place. The simple fact is that the Court is disposing of its great volume of judicial business with a thoroughness and dispatch which every State Supreme Court in the United States would do well to imitate.

3. I am in a position, because of intimate contacts with many lawyers, to ascertain the general reputation of the Supreme Court throughout the country both among members of the bar and among their clients. I assert without fear of successful contradiction, that no court of last resort in the entire United States disposes of its cases with greater satisfaction to litigants or stands higher in their estimation as an able and impartial umpire.

4. The character of the Justices being unexceptionable, their work being done with thoroughness and dispatch and their reputation for satisfactory service being high, it follows that no evil calling for cure has yet been shown unless it be the way in which they have recently decided a few cases in which the Presi-

dent had as much emotional interest as if he had been one of the litigants upon the record.

I believe that it is the general opinion of the American people that the President's proposal to change the membership of the Supreme Court would never have been made had the Supreme Court decided three specific cases otherwise than as it did. I refer to *Schechter v. United States* (N.R.A.), *United States v. Butler* (A.A.A.) and *Humphrey v. United States*—the case in which the Court nullified the President's attempt to remove an unacceptable member of the Federal Trade Commission. I do not mean that a few other cases cannot be cited as window-dressing. I am also aware of long-standing irritation because of divergent opinions respecting "due process of law." I, however, specify these three as the decisions which actually provoked the President to action. The practical question, therefore, is whether the decision in each of these cases is fairly ascribable to an opinion widely held by millions of Americans or whether it was so perverse and unintelligent a decision as to call for the removal of the Justices from office. I put it thus, because to give a Justice the alternative of resignation or of having his vote nullified by an understudy is the equivalent of removal.

Before referring to the questions which these cases presented, I desire to record a widespread conviction that in the first two of these three (N.R.A. and A.A.A.) the Court merely gave decent judicial burial to economic experiments which, however well meant, had proved to be colossal failures. When, therefore, a former Justice of the Court in an article recently published seeks to create the impression that in these cases the Court was on one side of the issue and the People of the United States on the other, he is either strangely ignorant of public opinion or reckless in his use of argument.

I am of opinion that all three decisions were sound and this opinion is, I believe, shared by a large majority of members of the American Bar. At the moment, however, the question is not whether the decisions were right or wrong but whether the Justices acted with such perversity and unintelligence that they deserve removal from office. To state the question is to answer it. It will not do to cloud the issue by talking about horse and buggy days, or by starting a discussion as to the age at which judges become unfit for duty or by agitating for a reform of the lower federal courts. These are so many red herrings drawn across the trail. The great, outstanding, overshadowing question is whether the Justices deserve to be disciplined for deciding as they did the N.R.A., the A.A.A. and the Humphrey case.

While the decision in the N.R.A. case is less than two years old, it may not be amiss to remind the bar of the points actually decided.

A wholesale poultry dealer in New York was prosecuted criminally for violations of the live poultry code. The charges were, in general, similar to the

thousands made all over the country during the N.R.A. period against industrialists for trade irregularities, great and small. For each such offense the defendant was alleged to be liable for a fine of \$500; and each day the irregularity continued was to be deemed a separate offense. It will be remembered that the charges were not based on his disobedience to any local laws made by the legislature of his own State for the regulation of his industry. The thing which was alleged to constitute his crime was a failure to conform to an official proclamation from the White House. It will likewise be remembered that this proclamation set forth a code that had not been enacted by Congress, but was merely prescribed by the President or approved by him upon the application of groups within the industry deemed by him to be "representative." The act of Congress (the National Industrial Recovery Act) purporting to empower the President to do these things merely declared it to be the congressional policy to "promote fair competition," prescribed penalties for code violations and left it to the President to determine what "fair competition" is, what regulation should be made to attain it and, in general, to rehabilitate industry and conserve natural resources.

The nine Justices were unanimous in the opinion that the constitutional rights of the little poultry dealer had been invaded and that his conviction was wrongful. The two principles for which the case stands are these: that crime cannot be created by executive order and that Congress lacks power to regulate commerce internal to a State.

In the A.A.A. case the Court, by a vote of 6 to 3, held that a so-called tax was invalid because in reality it was an exaction levied on one set of citizens (the processors) to raise a fund with which to subject to federal control the activities of another set of citizens (the farmers) in a sphere of commerce exclusively within the jurisdiction of the several States.

The principles invoked in this decision were two: that an exaction which has primarily a regulatory function is itself invalid if the regulation thus attempted is beyond the power of Congress; and that the regulation of agricultural production inside a State is not within the congressional power to regulate commerce among the States. The former Justice of the Supreme Court referred to above declares the A.A.A. decision to have been the announcement of "new and unprecedented constitutional doctrine." This declaration betrays a surprising unfamiliarity with constitutional law. Neither doctrine is new. Neither is unprecedented. Whether or not one agrees with the application of the doctrines to the facts disclosed by the record, is an entirely different question and is in point of fact the question upon which three of the Justices dissented. If six Justices deserve to be removed for differing from the other three in the A.A.A. case, surely the action of the three in that case ought to be counted unto them for righteousness when it is proposed to condemn them for agreeing with the six in regard to N.R.A.

Coming now to the most important point in both these cases—namely the interpretation of the commerce clause of the Constitution—it is interesting to note that not one person who declares the Court to have gone wrong has seriously proposed a formula to substitute for the supposedly erroneous interpretation. Even the professors of law, although not usually averse to recommending the impracticable, appear to shrink back shuddering from the test. The frankest of them confessed the other day to a Senate Committee that he has tried to express in words his idea of what the commerce clause really means but has been unable to do it to his own satisfaction. I hope that Senators perceive this to be the end of the attempt to convict the Court of unforgivable error. If the Court's interpretation of the commerce clause were demonstrably wrong it would be possible to express in words exactly what the commerce clause *does* mean in order that it may be clarified by amendment or in order to guide the President's new appointees in their work of enlightened interpretation. When a critic admits that this cannot be done, he is in the unfortunate position of asserting that the Court is wrong without himself being able to say what is right.

Of course the fact is that the true alternative is between the present commerce clause, as judicially interpreted, and a clean-cut delegation to Congress of power to regulate all commerce. No responsible person is willing to inflame public opinion by the latter proposal. To clamor for the removal of the Justices is therefore merely a childish way of expressing irritation at their decision.

If the discipline of Justices ought not to be thought of in connection with N.R.A. or A.A.A., such action is even less justifiable in the case of the Humphrey decision. The simplest way to describe that case is to say that the President was there attempting to pack the Federal Trade Commission just as he is now seeking to discipline the Supreme Court for frustrating that attempt.

The Court in *Myers v. United States* had decided by a vote of 6 to 3, that Congress could not compel the President to share with the Senate his power to remove executive officers. It followed that the removal of a postmaster by the President, in disregard of the requirement of Senate consent contained in the act creating the office, was a valid exercise of executive power. The President, without realizing the impropriety of attempting to subject to executive control an administrative body created by Congress to carry legislative policies into effect, sought to remove Humphrey in order to make way for a more pliable successor. "We think it plain under the Constitution" said the opinion of a unanimous Court, "that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named."

It is, of course, true that when one conceives of the federal government as a two-horse team, with Congress and the Supreme Court in harness and the Ex-

ecutive cracking the whip, such a decision as the Humphrey case places an uncomfortable obstacle in the speedway. On the other hand, if the power of both the executive and the legislative branch is subject to constitutional limitations and it is the function of the judicial branch to determine what those limitations are, then the decision in the Humphrey case, as also in the N.R.A. and A.A.A. cases, is to be applauded as a fearless discharge by the Court of the duty vested in it by the Constitution.

I am aware that in some quarters the Court has been charged with usurpation when in comparatively rare cases it has treated an act of Congress as unconstitutional. It has always appeared to me that this charge is the result of muddy thinking. Suppose an act of Congress authorizing the trial of a crime by a court without a jury and suppose that a defendant, against his protest, is tried and convicted under such an act. The Constitution provides that the trial of crimes shall be by jury. If such a case were to come before the Court, either the defendant would be set at liberty because the act was unconstitutional or the defendant would be remanded on the ground that the Constitution was unconstitutional. If any one doubts what the duty of the Court is in such a case he may qualify as an eminent liberal but he certainly ought not to enjoy the rights of American citizenship.

I have referred to that irritation caused by the Court's interpretation of the "due process of law" clause in the V and XIV Amendments. Here I note an interesting inconsistency between criticism levelled at the Court on this score and the complaints of the same critics respecting the Court's interpretation of the commerce clause. As to the latter, the complaint is that the Justices have construed the clause as narrowly as it would have been construed by its draftsmen a hundred and fifty years ago. When, however, the Court attempts so to develop the due process clause as to deal with new and unpredictable situations, the cry is raised that the draftsman of that clause never intended it to be so developed. Of course the explanation of the inconsistency is simple. The commerce clause is a grant of power. The due process clause is a restraint on power. When power-lust takes possession of a man he is eager to enlarge the grant and to minimize the restraint. Accordingly the enthusiastic New Dealer is eager for an impossibly broad interpretation of the commerce clause and an impossibly narrow interpretation of "due process of law."

Reviewing the whole record the conclusion is inevitable that the President has utterly failed to lay at the door of the Court any evil which justifies the removal of the Justices. The idea that the Justices, as men, are less eager than the President to see distress relieved is an idea that will not be entertained by anybody who knows both the Justices and the President. The real difference between him and them is that they take the Constitution seriously and that he does not. When one compares what he is attempting with what

he might so reasonably have done, the contrast is literally tragic. If a year ago he had proposed constitutional amendments to empower Congress to reinstate N.R.A. and A.A.A. and to authorize the President to remove commissioners and judges at his pleasure, he would by this time have had his answer from the people. He might have said to the country "The Supreme Court has pointed out constitutional obstacles in the path of my policies. Let us in an orderly way remove them." Then in his campaign for reelection he could have presented the issue to the electorate and if the country had accepted his policy he could have appealed with justifiable confidence to an actual constitutional authority. Instead of following this honest and obvious course he has wasted in sullen resentment the year in which the amendment might have been secured, has withheld a vital issue from the people and now, on the authority of an empty rhetorical "mandate," is seeking to revolutionize the people's government without giving the people a chance so much as to express themselves.

II.

If the President's proposal were merely an unreal remedy for an imaginary evil what has already been said would be sufficient to dispose of it. In fact, however, both the way in which it has been put forward and the proposal itself brand it as a dangerous mischief-maker.

1. The proposal, if adopted, will either force the resignation of Justices or enlarge the Court by the appointment of understudies. Either result would be deplorable. To reward lives of devoted service by ignominious removal would prove the base ingratitude of republics. To enlarge the Court, possibly to fifteen, would make it unwieldy and would waste public money by employing fifteen men to do badly what is now being well done by nine. As the Chief Justice has said: "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the Court is concerned."

2. There has been much thoughtless talk about divisions of opinion in the Court. To enlarge the Court will not, of course, diminish but rather increase the probability of division. This, however, is not, in itself, an evil. In a parliamentary system, where majorities govern, escape from split decisions is impossible. If the President had his way, the Congress would decide whether an act is constitutional, but congressional unanimity on such a question is of course unthinkable. The Senate acquitted President Johnson by one vote. The Electoral Commission of 15 (note the number) divided 8-7 on the question whether Hayes or Tilden was to be President. I recall in the Senate an important issue that was decided by the margin of a single vote. While, therefore, split decisions cannot be avoided, their prob-

ability should not be increased. The President's proposal would obviously increase it.

The suggestion that unanimity or more than a bare majority of Justices should be required in order to declare an act unconstitutional has little to commend it. If unanimity were requisite, one Justice might become the interpreter of the Constitution. Even when the Court in rare cases divides 5-4, it is the view of five that prevails and not merely the view of one. If a two-thirds majority were required and the validity of an act were then to be sustained against the protest of more than half the Court, the citizen (sent, perhaps, to jail) would have a much stronger reason than at present to rail at the practical consequences of division.

3. One of the most dangerous consequences of accepting the President's proposal would be the effect on minorities of lodging with the executive the power to undermine the independence of the Court. The rule that discourages racial and religious issues in political campaigns must not be so distorted as to apply to the present controversy. Here the question is not whether A or B shall be elected to political office but whether A and B shall be deprived of their guaranties of civil and religious liberty. It is always the minority that needs constitutional protection. The majority can (perhaps) be left to take care of themselves. We have many minority groups in this country—industrial, racial and religious. They had better wake up to the fact that an independent judiciary is their best friend. Labor is such a minority. Short-sighted labor leaders, because they count on controlling the President, are pleased with the idea that he should control the Court. Let them beware. There are presidents—and presidents. The Jews are a racial minority. It cannot be possible that they are blind to the signs of the times. If ever a minority should agitate for a judiciary independent of the executive the Jews should realize that they are that minority and that now is the time. The Catholics constitute another minority group. Their leadership is always intelligent. They are finding something to think about in Mexico, Germany and Russia. The schools, the colleges and the universities are another minority group. The foes in their own household are professors who fail to realize that an independent judiciary is essential to academic freedom. Merely because their attacks upon the Court are acceptable to the president now in office, these men close their eyes to the situation in which they might wish to criticize a president who had it in his power to muzzle them. Journalists constitute another minority group. It ought not to be necessary to remind gentlemen of the press what happens to their liberty when the courts cease to be independent and can be disciplined by executive action. Unless labor leaders, Jews, Catholics, educators and editors come to their senses before it is too late they will find themselves in an America which is anything but a land of the free.

4. But the most dangerous of all the consequences of the President's proposal is the inevitable impair-

ment of respect for government. Everybody understands how dangerous it is to undermine the credit of a bank. Too few citizens reflect upon the even greater harm that comes when people are encouraged to lose faith in their government. When Mr. Roosevelt, angered by the check on his agricultural program, shouted to an applauding audience "You know who assumed the power to veto, and did veto, that program" he did more harm in ten seconds than patriots can repair in a generation. When his Secretary of Agriculture publicly criticized the A.A.A. decision as a "legalized steal" he was subordinating the good of his country to an emotional satisfaction. Such intemperate expressions by men in high place give great encouragement to the lawless element in the country at the very time when public confidence in government should be stimulated rather than impaired. No greater disservice could possibly be done to America.

I anticipate the type of attack that will be made on me personally because of what I have here written. I was on the losing side in the Myers case and on the winning side in the A.A.A. case. I am more than seventy years old and I am a Republican. I enter a plea of guilty to all four indictments. Having thus disposed of myself, we can resume consideration of the real question, which is "What should be done with the President's proposal?"

Because there is in the Supreme Court no such evil as the proposal presupposes and because the proposal itself is inherently destructive of our free institutions, the call comes to Senators and Representatives irrespective of party either to reject it by a reassuring vote or give to the people a chance to pass upon an amendment so drawn as not to affect the tenure of Justices in office.

A LAW TEACHER'S VIEW OF THE PRESIDENT'S PLAN

One of the Foundation Stones of Our Government Is That the Supreme Court Be Composed of an Unbiased, Impartial Group of Men, Not Committed in Advance of Their Appointment to Any Particular Policy or Plan—The President's Plan Endangers This Impartiality—It Would Also Attempt to Secure a Constitutional Amendment by Construction Instead of by Submission to the States—Arguments for Plan Considered—Far Better to Spend a Year or Two in Discussing and Adopting Whatever Constitutional Amendments May Be Necessary

BY GEORGE G. BOGERT

Professor of Law at the University of Chicago

IN explaining my opposition to the President's plan regarding the Supreme Court I should first state that I am in favor of many of his policies. I voted for him in 1936. I believe labor is entitled to a larger share of the product of industry and to better working conditions. I favor legislation to give the farmer greater income. I am in hearty sympathy with governmental aid of projects for better housing of the poor, social security, the preservation of our soil and other natural resources, and protection from floods. In other words my objection to the plan is not an indirect or unconscious result of hostility to Roosevelt's policies or to the Democratic party.

I have accepted membership on a committee for Illinois to propose amendments to change the federal constitution in the belief that it is probably inadequate to meet our needs.

In considering the merits of the proposed increase in the number of justices of the Supreme

Court a few fundamentals should be borne in mind. The federal government is one of limited powers. In forming it the people decided that Congress and the President were to be allowed to do only certain named acts and not whatever Congress and the President thought from time to time was for the best interests of the people. If the powers originally granted Congress and the President proved inadequate for good government, it was contemplated that they would ask an extension of those powers through a constitutional amendment submitted to the people for approval through the states.

In such a scheme of government obviously some agency must decide whether Congress and the President are exceeding the powers granted to them by the Constitution. To leave that question to Congress and the President would be impractical. They could not be expected to pass upon the extent of their own powers. In their zeal to accomplish

desired objects they would favor themselves and take more and more authority into their hands.

An impartial agency outside the legislative and executive departments must decide when Congress and the President are exceeding the powers granted to them by the people. This was contemplated by the framers of the Constitution and the Supreme Court was set up for this purpose, as well as to accomplish justice between litigants in certain cases.

It is, therefore, one of the foundation stones of our government that the Supreme Court be composed of an unbiased, impartial group of men, not committed in advance of their appointment to any particular policy or plan. They must be free to decide purely on the merits all questions as to whether Congress or the Executive has exercised powers granted to the states or reserved to the people, whether the states have attempted to infringe on the powers of the federal government, and whether there has been a violation of the fundamental rights of the citizens as expressed in the bill of rights. Any proposal which will threaten this unbiased and impartial attitude of the highest court, therefore, deserves opposition from all who believe in orderly government under our Constitution.

Does the President's plan endanger the impartiality of the Supreme Court? I believe it does. In substance the President has announced that the six new justices would be appointed in order to make it certain that whatever legislation the President and Congress may think necessary for the welfare of the country would be held constitutional. What, then, would be the position of one of whom an appointment to the court was offered? Is it not clear that, even though the appointment was offered in unqualified terms and without express condition, the implication would be that the appointee was expected to vote to support the constitutionality of such new deal legislation as should later come before the court? The plan has no purpose unless it secures such judges.

Because of death or retirement of some of the nine present justices the six new appointees would soon constitute a majority of the court. Thus, within a few months or years the court would be controlled by a group which could not honestly pass on the merits of the acts of Congress or the President but must always consider such acts in the light of the discussion which had preceded their appointments and the subtle, implied pledge which had been exacted from them by the President on their appointment.

Not only would the new Supreme Court be a prejudiced body because of the implied terms of the appointment of the six new justices, but also by reason of the fact that six justices would be ap-

pointed at one time. It is unwholesome that the will and judgment of one man, the spirit and stress of one year, should fix the majority personnel of the court for fifteen or twenty years. This would insure as a controlling influence for a long period men of very similar experience and attitudes. The gradual addition to the court of new appointees, one by one, is a process much better adapted to securing justices representing all classes and schools of thought in the nation, from whom can be expected fair consideration of questions of policy and construction.

Furthermore, the particular type of bias or prejudice which the Supreme Court as reconstituted would have would be especially unfortunate at this time. It would be a bias or prejudice in the direction of supremacy of the Executive, of surrender to the judgment and will of the President. No matter how much the admirers of Mr. Roosevelt may value his sincerity, ability, and nobility of purpose, they must recognize the world tendency toward centralization of power, toward dominance of the executive department. During Roosevelt's administration Congress has lost much of its initiative and independence. Many of the most important bills passed by the legislature have been drafted by presidential assistants or by cabinet officers. More and more Congress looks to the President for leadership, direction, or instruction. Any tendency in legislation which will to any degree accentuate the gravitation of power toward the executive is, in my opinion, vicious and against public policy. And surely if the majority of the Supreme Court accepted their appointments from the President and the Senate with the President's messages and speeches in the background they would to a considerable degree be committed to following him in his governmental policies.

Secondly, the new plan is not desirable because it would attempt to secure a constitutional amendment by construction instead of by submission to the states. The Constitution was framed on the theory of the reservation of control of local affairs to the states, at a time when the states were jealous of their separate rights, travel was slow and difficult, the union was loosely knit, and dealings between states were less important. With the 150 years which have elapsed there has come rapid communication, great increase in the population, enormous industrial development, a decrease in jealousy of state's rights, the entrance of more problems which affect the whole nation, and an increasing tendency to look to Washington. In my opinion the language of the Constitution cannot by any natural or reasonable interpretation be stretched to include a grant of all the powers which the present demand for centralization includes. If respect is paid to the intent of the framers of the

constitution and not to what would be the intent of a constitutional convention of today, the Constitution is inadequate in its grant of powers to the federal government. Not all the widespread reforms and reliefs of the New Deal can possibly be declared constitutional under our present document without torturing or ignoring the language of that instrument.

If one has this belief (and it is admittedly a matter of opinion), he is forced to see in the new plan something subtly immoral and dishonest,—an effort to get the high court to find in the Constitution an intent never meant by the people to be there and to hold the words of that document to have an unnatural and strained meaning. The desire is to avoid the labor, risk and delay of constitutional amendment by securing a court which will alter the Constitution to suit the spirit of the prevailing majority.

The arguments for the plan seem to be principally (1) that the vote of November, 1936, calls for its adoption; (2) that numerous social reforms much needed and desired by the majority of the people cannot be accomplished unless the personnel of the court is changed; and (3) that an emergency demands this action now.

The mandate of November, 1936, was to carry out the policies set forth in the Democratic National platform of 1936. The new Supreme Court plan was not mentioned there. It was rather excluded as a Democratic policy because the Republicans challenged the Democrats to take a position regarding plans for tinkering with the court and the Democrats remained silent on that issue. It was also excluded by the plank in the Democratic platform which stated the belief of the party that the Constitution was broad enough to permit all desired reforms, followed by the statement that if it was not broad enough the Democrats would seek appropriate amendment. Hence the people's mandate of 1936 may be said to have been to seek reform and progress under the Constitution as at present drafted and with the court as at present constituted, until such time as it should appear that an amendment of the Constitution to grant Congress further powers was necessary, and then to procure such an amendment.

Next it is argued that the court as at present constituted is thwarting the will of a majority of our citizens, that great social and economic changes desired by the larger part of our people cannot be made because the Supreme Court declares that the Constitution does not authorize Congress to make them. But the function of the Court is not to interpret popular opinion but rather to discover the meaning and intent of the Constitution. It is only the purpose of the people as they have set it forth

in their fundamental law which can be followed by the courts. If the popular will demands legislation for the advance of its welfare, it can obtain it, but it should obtain it in the orderly way set forth in our frame of government. Surely, it is obvious that to compel the courts to regard as constitutional and lawful whatever laws Congress or the President thought from time to time were for the best interests of the people and were in accord with the popular will would lead to chaos, usurpation of powers, and dictatorship.

I am unable to understand the cry of "emergency." No great change, except an improvement in economic conditions, has come about since the election platforms and speeches of 1936 and no emergency was then mentioned. No bill of particulars has been given showing just what laws which are vital to immediate social and economic stability cannot be passed for fear of the Supreme Court. Decisions have shown that many, though not all, of the New Deal measures can be secured under the Constitution as it stands and with the court of nine members. Those reforms which would lack constitutional authorization under the present court can safely wait the year or two which constitutional amendment would require.

If experience shows that federal judges in many cases lose efficiency after 70, a constitutional amendment for compulsory retirement at that age should be adopted. The plan to add six judges would, according to the theory of its originators, leave six incompetent elderly judges on the court until they were removed by death or forced to resign because of humiliation or ill health.

Baldly stated, the President's plan to add judges seems based on a sincere belief in his own vision of the people's needs and his ability to meet them, on impatience with the slow process of regular constitutional development, on a very human and understandable pique and petulance with some members of the court who are admittedly ultra-conservative, or on lack of a discriminating ethical sense which would discern the injurious effects on the impartiality and honesty of the court, or possibly on a subconscious attitude that the end justifies the means, even though the means consist in tampering with fundamental governmental principles.

It seems far better to spend a year or two in discussing, formulating and procuring the adoption of whatever constitutional amendments are necessary to obtain an efficient federal judiciary and to broaden our Constitution to meet the popular conception of our present social and economic wants, and thus to preserve the integrity of the federal judiciary and maintain an orderly constitutional development.

AN INDEPENDENT SUPREME COURT AND THE PROTECTION OF MINORITY RIGHTS

An Examination of Those Cases in Which the Rights of Individuals and Minority Groups Have Been Infringed by Governmental Action Demonstrates that the Supreme Court Has Been Alert and Courageous in Curbing the Abuse of Power and in Intervening for the Protection of the Oppressed—The South after the Civil War and Decisions Upholding Rights of Individuals and Local Communities—Rights of Religious Groups Sustained against Unwarranted Measures—Racial Groups—American Citizens of Foreign Descent—Minority Groups and Freedom of Speech and the Press—Labor Unions—Individual Citizens Charged with Criminal Acts, etc.

BY WILLIAM J. DONOVAN
Member of the New York Bar

THIS article is concerned solely with the question whether the existence of an independent judiciary in this country has protected the civil liberties of minority groups. The recent proposal by President Roosevelt to increase the size of the Supreme Court makes this question one of great interest. Fear has been expressed as to the implications of the plan.

Are we to subscribe to the doctrine that only those judges should be appointed who are responsive to the expressed will of the political party which happens to be in power? What will be our future if the Supreme Court becomes amenable to the will of the Congress or of the President? These questions have jolted us from a complacent acceptance of our present institutions. Public discussion has disclosed various dangers in the loss of an independent judiciary.

Most of us have been brought up to believe in the necessity of the Supreme Court in our form of government. That is particularly true because of the limitations placed upon the power of our government by the first ten amendments to the Constitution. An examination of the debates in the State Conventions which adopted the Constitution, and in the first Congress in regard to the submission of these amendments to the people, makes it clear that the Americans of that time agreed with Alexander Hamilton, who said that "you must first enable the government to control the governed; and in the next place oblige it to control itself."¹

In his book, "Congress, the Constitution and the Supreme Court," Charles Warren points out that "these indispensable parts of the Constitution, containing restraints on Congress, are the result of radical demand in 1788; and when they now advocate making Congress the supreme judge of what it shall have the power to do, they seek to undermine and destroy the effect of the very provisions of the Constitution, which the radicals

of 1788 deemed necessary for their protection as Americans and as human beings."²

In opening the debate in Congress on the adoption of the amendments to the Constitution, James Madison referred to various objections that had been made to that document and then said:

"... but I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we consider them safe, while a great number of our fellow-citizens think these securities necessary."³

These securities were no idle words to the Colonists. They had experienced the abuses of government, both royal and state. They had seen state legislatures impair the rights of citizens. They had therefore determined that there would be no uncontrolled power in the new government.

It was felt, in the words of Patrick Henry, that "the judiciary are the sole protection against a tyrannical execution of the laws."

Into the hands of the Supreme Court was committed the duty and obligation of enforcing the limitations against the Government in favor of the individual rights of the citizens. That Court was to be a barrier against the exactions and despotisms of arbitrary power. That Court was to be the security for the rights of life, liberty, and property.

The controversy that rages now raises these questions. During the life of this government has the Supreme Court met this test? Has it been a shield for the citizen against the encroachment of arbitrary power? Has it safeguarded the liberty of the minority? In times of hysteria has it saved the individual against governmental usurpation of power? The surest way to answer

1. Alexander Hamilton, "The Federalist," No. 51, February 8, 1788.

2. P. 85.

3. Annals of Congress, 1st Congress, Vol. 1, p. 433, June, 1789.

these questions is by an examination of those cases in which the rights of individuals or of minority groups have been infringed by governmental action. An examination of those cases demonstrates that the Supreme Court has been alert and courageous in curbing the abuse of power and in intervening for the protection of the oppressed.

The duty of the Court in this regard has nowhere been better stated than by Chief Justice Marshall in the great case of *Dartmouth College v. Woodward*:⁴

"In pronouncing this judgment it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predicament in which this Court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different States, between a State and its citizens, and between different States. It stands, therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that.

"Under these impressions I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgement of our country."

By the very nature of its position as arbiter between the Government and the individual citizen, the Supreme Court must often antagonize large groups against which it renders decisions. Furthermore, the Court, like any other human institution, has made and will doubtless continue to make mistakes. With this in mind we turn to a consideration of the decisions in which the Court has protected minority groups and individual citizens. This protection has been both by holding unconstitutional Acts of Congress or of State legislatures and by holding that the citizen's constitutional rights had been violated by other agencies than those legislative bodies.

A. THE SOUTH AFTER THE CIVIL WAR

Doubtless any Southerner who lived during the post-Civil War period can well recall what happens to a community when it is subject to the will of a vengeful majority in the Federal Congress. That majority sought to dictate to the prostrate South by legislation in regard to matters which were purely local and social, and which were of no economic concern whatsoever.

In a series of courageous decisions, such as *United States v. Reese*,⁵ *United States v. Cruikshank*,⁶ and the *Civil Rights Cases*,⁷ among others, which like, many of

its recent opinions, stirred up a storm of protest among the administration's supporters and caused it to be subjected to violent abuse in Congress, the Supreme Court declared that regulation of hotels, theaters, voting, and the like was a purely local matter which was not subject to control by the Federal Congress. These cases involved no economic or labor problems, but were purely questions of civil rights, and no one today would challenge the useful service which the Supreme Court performed in upholding the right of the local communities to settle these matters for themselves.

Also pertinent here is the case of *Ex parte Garland*,⁸ wherein was involved an Act of Congress prohibiting any person from practicing law in the Federal courts unless he should first swear that he had not aided the Confederate cause.

Mr. Garland, who, incidentally, later became a United States Senator and was Attorney General under President Cleveland, had been admitted to the bar of the Supreme Court of the United States prior to the passage of the act. Although he had been active in supporting the Confederate States during the Civil War, he had received a full pardon from the President of the United States for all offenses committed by his participation in the Civil War. He produced this pardon and asked permission to continue as an attorney of the Supreme Court without taking the oath required by the Act of Congress. The Court held that the law, in exacting the oath as to Mr. Garland's past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act and was therefore unconstitutional.

Another case which is very similar to *Ex parte Garland* involved the validity of a provision of the Constitution of the State of Missouri. This case, *Cummings v. Missouri*,⁹ is of equal importance in showing the manner in which the United States Supreme Court protected those of our citizens who sympathized with the South against the loss of their civil liberties and rights.

The defendant, in the case, who was a Catholic priest, was indicted and convicted of the crime of teaching and preaching as a priest of that religious denomination without having first taken the test oath prescribed by the Constitution of Missouri. He was sentenced to pay a fine of \$500 and was committed to jail until the fine was paid. The Supreme Court of Missouri affirmed the conviction, and the case was brought to the Supreme Court of the United States on a writ of error. The oath required the affiant to deny not only that he had ever "been in armed hostility to the United States or to the lawful authorities thereof," but, among other things, that he had ever "by act or word" manifested his allegiance to the cause of the enemies of the United States or his desire for their triumph or his sympathy with those engaged in rebellion, or had

4. 17 U. S. (4 Wheat.) 518, 712.

5. 92 U. S. 214.

6. 92 U. S. 542.

7. 109 U. S. 3.

8. 4 Wall. 333.

9. 71 U. S. (4 Wall.) 277.

ever harbored or aided any person engaged in guerilla warfare against the inhabitants of the United States.

Every person who was unable to take this oath was declared incapable of holding in the State of Missouri any office of honor, trust, or profit under its authority or of acting as a professor or teacher in any educational institution or of holding any real estate or other property in trust for the use of any church, religious society, or congregation. The constitutional provision further stated that without taking the oath no person should be permitted "to practice as an attorney or counsellor at law, nor after that period can any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach or preach or solemnize marriages." As was stated in the opinion of the Supreme Court by Mr. Justice Field, the oath thus required was for its severity without any precedent that he could discover. The Supreme Court held that the constitutional provision violated the guaranties of the Constitution of the United States and was therefore invalid.

We can never be sure when any one part of the country may be subjected to inimical legislation at the hands of a Congress which is dominated by the interests of other sections. These post-Civil War decisions of the Supreme Court are therefore highly significant. They demonstrate the protection afforded by the Constitution, when interpreted by a fearless and independent Court, to sections of the nation that happen to be outnumbered in Congress and out of favor with the Chief Executive.

B. RELIGIOUS GROUPS

The Supreme Court has upheld the right of religious groups in the United States to be free from unwarranted oppression at the hands of governmental authority.

In 1922 the voters of Oregon enacted an initiative law providing that every parent of a child in Oregon between the ages of eight and sixteen years must send such child to the public schools. The effect of such a statute would, of course, be to wipe out all parochial and other private religious schools. The measure was in fact intended to bring about such a result. This is clearly indicated by the opinion of the Federal District Court for the District of Oregon in the case of *Society of Sisters v. Pierce*.¹⁰ where it was stated by Judge Wolverton that:

"The act could not be more effective for utterly destroying the business and occupation of complainants' schools, except, perhaps, the college and higher preparatory grades, if it had been entitled 'An act to prevent parochial and private schools from teaching the grammar grades.' This serves to emphasize the seriousness of the controversy. Indeed, the simile is no stronger than the argument for the adoption of the measure put it: 'A divided school can no more succeed than a divided nation.' That

such is the purpose of the act is obvious and incontrovertible."

The District Court granted preliminary injunctions restraining the Governor and other officials of the State of Oregon from attempting to enforce this law, and the Supreme Court affirmed the decree¹¹ on the ground that the law unreasonably interfered with the liberty of parents in educating their children. It was therefore unconstitutional in the light of the Fourteenth Amendment to the Constitution.

It is significant to note that not only did the Catholic Church recognize the threat to its schools embodied in this law, but that various other religious groups were likewise aroused. A brief was filed in the Supreme Court as *amicus curiae* by the American Jewish Committee, representing the parents of Jewish children and the teachers who maintained private schools for the education of Jewish children in the United States. On page 2 of this brief it was stated:

"They (the Committee) regard Chapter I of the General Laws of 1923 of the State of Oregon as an infringement upon the liberty of the individual and a deprivation of those who maintain such private schools, not only of their liberty, but also of their property."

A brief adopting a similar attitude was filed by the North Pacific Union Conference of Seventh Day Adventists and also by the Domestic and Foreign Missionary Society of the Protestant Episcopal Church.

At this point it is pertinent to again mention the case of *Cummings v. Missouri*,¹² in which it will be recalled that a Catholic priest was convicted because he performed the duties of the priesthood without taking an oath that he had not aided the Confederate cause. If an oath of this sort can be required, and it should be recalled that an *independent* Supreme Court held that it could not, an oath that one is not a Catholic or a Jew, or a member of any church, can be required as a requisite for teaching, voting or acting in any capacity whatsoever.

The importance of these decisions to religious and racial groups is obvious when we recall the religious feeling and intolerance that were engendered by the Presidential campaign of 1928. And when we see what has happened to minority religious and racial groups in other countries today we realize that it is not too fantastic to suppose that some future administration, in a time of great excitement and popular feeling, might endeavor to curtail the religious liberties of certain of our citizens. If the Supreme Court can be enlarged to permit of such curtailment, these citizens will of course be helpless. If we can predict the future by our experience in the past, it would appear that continued religious freedom is dependent upon maintaining a judiciary free from the domination of the two political branches of our Government, the Congress and the President.

11. 268 U. S. 510.

12. *Supra*.

10. 296 Fed. 928, 936.

C. RACIAL GROUPS

Two racial groups have suffered particularly at the hands of the dominant element in various parts of the United States. These are the Negroes and the Chinese.

There have been innumerable decisions by the Supreme Court protecting the civil rights of the American Negro. Some of these have declared State laws or city ordinances unconstitutional which tended to impair those rights. Others have held that certain trials were not so conducted as to afford the Negro defendant the safeguards which are provided by our Constitution to accused persons. We will first take up the cases involving statutory discrimination.

This discrimination has frequently taken the form of exclusion of colored persons from juries.¹³ While it is well settled that a defendant has no constitutional right to insist that members of his own race shall actually sit upon the jury which determines his fate,¹⁴ it is equally well settled that service upon such a jury must be possible for such persons.¹⁵ In other words, the fact that no colored person happens to be a member of the jury must be due to some factor other than exclusion because of his race.

Typical cases are *Strauder v. West Virginia*¹⁶ and *Bush v. Kentucky*.¹⁷ In the former a conviction of a colored man for murder was set aside because the statute under which the jury was chosen limited the selection of jurors to "white male persons." In the latter a similar conviction was reversed because the statute barred colored persons from serving on the grand jury.

There have, of course, been many instances in which the feeling and prejudice against the colored race have invaded the courtroom to such an extent that, although no unconstitutional statute was involved, the Negro defendant was not afforded a fair trial.¹⁸ In these cases the Supreme Court has upheld the principle that the guaranty of a fair trial extends to all American citizens regardless of race, creed, or station in life.

The *Scottsboro* cases are perhaps the best known of these decisions. In one of them, *Powell v. Alabama*,¹⁹ the Court reversed the convictions and death

sentences of the poor and ignorant colored defendants, who, the record showed, had been tried in the midst of tremendous popular resentment and who had not been given an adequate opportunity to obtain counsel and prepare a defense.

One of the most stirring opinions in which the right of members of the colored race to a fair trial was upheld is that delivered in the very recent case of *Brown v. Mississippi*.²⁰ The several colored defendants in this case were indicted on April 4, 1934, for the murder of one Raymond Steward, whose death had occurred on March 30 of that year. They pleaded not guilty, and counsel were appointed by the trial court to defend them. The trial began the next morning and was concluded on the following day, when the defendants were found guilty and were sentenced to death. According to Mr. Chief Justice Hughes, the question before the Supreme Court was whether these convictions, which rested solely upon confessions which were shown to have been extorted by State officers by brutality and violence, were consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. The Court had no difficulty in deciding that the constitutional rights of the defendants had been violated. The convictions were therefore set aside in language that every American should read:

"The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' *Snyder v. Massachusetts, supra*; *Rogers v. Peck*, 199 U. S. 425, 434. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker v. Sauvinet*, 92 U. S. 90; *Hurtado v. California*, 110 U. S. 516; *Snyder v. Massachusetts, supra*. But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. . . ."

One of the most significant of the decisions involving a member of the Chinese race is *Wong Wing v. United States*.²¹ On July 15, 1892, Wong Wing, Lee Poy Lee Yon Tong, and Chan Wah Dong were brought before a commissioner of the Circuit Court of the United States for the Eastern District of Michigan, upon a charge of being Chinese persons unlawfully in the

13. Other forms of statutory discrimination which have been held to be unconstitutional include exclusion of Negroes from voting in primaries (*Nixon v. Condon*, 286 U. S. 73, and *Nixon v. Herndon*, 273 U. S. 536) and exclusion from sections of the city (*Buchanan v. Warley*, 245 U. S. 60).

14. *Martin v. Texas*, 200 U. S. 316; *In re Wood*, 140 U. S. 278; *Virginia v. Rives*, 100 U. S. 313.

15. *Norris v. Alabama*, 294 U. S. 587; *Martin v. Texas, supra*; *Rogers v. Alabama*, 192 U. S. 226; *Bush v. Kentucky*, 107 U. S. 110; *Strauder v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, 103 U. S. 370.

16. *Supra*.

17. *Supra*.

18. *Powell v. Alabama*, 287 U. S. 45; *Norris v. Alabama, supra*; *Carter v. Texas*, 177 U. S. 442; *Moore v. Dempsey*, 261 U. S. 86; and *Brown v. Mississippi*, 297 U. S. 278, are outstanding.

19. 287 U. S. 45. The language of the opinion in this case is an especially clear presentation of the way in which the Supreme Court extends the protection of the Constitution to the humble citizen. The Court said: "In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of

public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."

20. 297 U. S. 278.

21. 163 U. S. 228. See also *United States v. Wong Kim Ark*, 169 U. S. 649, and *Yick Wo v. Hopkins*, 118 U. S. 356, for excellent examples of how the Supreme Court has shielded the Chinese from oppressive measures.

United States and not entitled to remain there. The commissioner found that these men were unlawfully within the United States, and he ordered them to be imprisoned at hard labor for sixty days. The order was based upon Section 13 of the Act of September 13, 1888,²² which authorized the imposition of such a sentence after a hearing before a United States commissioner.

The Chinese sought a writ of *habeas corpus* in the Circuit Court and, when it was denied, appealed to the Supreme Court of the United States. The Supreme Court held that the writ should have been granted, because the Chinese were within the protection of the Fifth and Sixth Amendments, which guarantee to all persons charged with an infamous Federal crime the right to a presentment or indictment by a grand jury and speedy trial by an impartial jury.

The foregoing cases are illustrative of the protection that is afforded by the Supreme Court to the various racial groups that are to be found in the United States. The cases demonstrate that racial discrimination is not unusual in this country and that it has often been practiced by those in authority. Any group that may be subjected to oppressive measures by a majority or controlling portion of the populace therefore has a vital interest in the maintenance of a Supreme Court which is free from domination by the executive or legislative branch of the Government.

D. AMERICAN CITIZENS OF FOREIGN DESCENT

Although there have not been many cases of this sort presented for its consideration, the Supreme Court has shown itself to be ready to protect our citizens of foreign descent from oppressive measures which violate the personal liberties that are guaranteed to them by the Constitution of the United States.

During the World War hysteria several States passed laws which had the effect of prohibiting the teaching of German in the schools.²³ The Supreme Court of the United States, in the cases of *Meyer v. Nebraska*,²⁴ *Bartel v. Iowa*,²⁵ *Bohning v. Ohio*,²⁶ *Pohl v. Ohio*,²⁷ and *Nebraska District of Evangelical Lutheran Synod v. McKelvie*,²⁸ held these laws to be unconstitutional because they interfered with the private rights of individual citizens.

Typical of these decisions is *Meyer v. Nebraska*, in which the defendant was convicted in the District Court for Hamilton County, Nebraska, upon a charge of having unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years who was a student in the Zion Parochial School and who had not attained and successfully passed the

eighth grade. The conviction was affirmed by the Supreme Court of Nebraska.

The information in this case was based upon "An Act relating to the Teaching of Foreign Languages in the State of Nebraska,"²⁹ which forbade the teaching of any subject to any person in any language other than the English in private, denominational, parochial or public schools of the State. The ban only applied to children who had not successfully passed the eighth grade of school. Persons violating the provisions of the Act were subject to a fine of from twenty-five to one hundred dollars, or to confinement in the county jail for a period not exceeding 30 days.

The Supreme Court of the United States reversed the judgment, Mr. Justice McReynolds saying:

"Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment."

These laws are, of course, only a mild example of what might happen during the clamor and prejudice of a future war. Laws confiscating the property of our citizens of foreign descent and imprisoning them might conceivably be enacted during a time of great excitement. It is therefore very apparent that the preservation of an independent Supreme Court, which is not subject to the control of any President, may mean much to this class of citizens in future years.

E. MINORITY POLITICAL GROUPS

Political groups whose views are opposed to those of the majority of their fellow citizens are especially subject to abuse at the hands of any government of which they happen to be critical. It is therefore of great importance to them that freedom of speech and of the press be maintained.

There was little occasion before the World War to deal with violations of the First Amendment's guaranties of such freedom.³⁰ In a case decided in 1907 the Supreme Court stated that "The main purpose of such constitutional provisions is to 'prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."³¹ However, if the legislature could punish with impunity after the publication of critical matter, it is obvious that freedom of speech and of the press would be gone. It is therefore fortunate that the Supreme Court enlarged its conception of these important constitutional rights in a series of cases decided under the Espionage Act of 1917.³² In these

22. C. 1015, 25 Stat. 476, 479.

23. Laws of Nebraska, 1919, c. 249; 108 Ohio Laws 614; Laws of Iowa, 1919, c. 198.

24. 262 U. S. 390.

25. 262 U. S. 404.

26. Ibid.

27. Ibid.

28. Ibid.

29. Laws of Nebraska, 1919, c. 249.

30. Hughes, "The Supreme Court of the United States," p. 163.

31. Patterson v. Colorado, 205 U. S. 454, 462.

32. Schenck v. United States, 249 U. S. 47; Sugarman v. United States, 249 U. S. 182; Frohwerk v. United States, 249 U. S. 204; Debs v. United States, 249 U. S. 211.

unanimous decisions the Court refused to limit the right to freedom from restraint prior to publication, and instead set up the "present danger" test. If there is no clear and present danger that the statements made will cause the evils which the legislature has a right to prevent, the speaker or writer may not be punished. In a number of cases decided a few years after those above referred to the Supreme Court divided, but the division seems to have been in regard to the application of the "present danger" test to the particular facts rather than in regard to the soundness of the test itself.³³

In *Whitney v. California*,³⁴ although they concurred in the result, Justices Brandeis and Holmes stated that they were "unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment."³⁵

It would appear that this more liberal view is now shared by a majority of the Court. In the recent case of *Stromberg v. California*,³⁶ the California red flag law was declared unconstitutional to the extent that it was sought to criminally convict a young girl whose only offense was displaying a red flag at a camp school where advanced political views were taught.

The case of *De Jonge v. State of Oregon*,³⁷ which was decided a few weeks ago, is of great significance to minority political groups who may have cause to fear that their right to express their views will be interfered with by the parties who happen to be in power at any given time. In this case the Court set aside the conviction of a man for merely being present at a meeting which was called by the Communist Party, of which he was a member. The court below interpreted the indictment to charge defendant merely with participation in a meeting called by the Communist Party, without charging that subversive doctrines were advocated at that meeting.

The United States Supreme Court pointed out that if the Oregon statute could cover a situation such as this, any speaker who assisted in the conduct of the meeting, however innocuous the object of the meeting may have been and however reasonable and timely the discussion, would have been subject to imprisonment as a felon if the meeting was under the auspices of the Communist Party. In reversing the judgment of conviction, Chief Justice Hughes said:

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse.

The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."³⁸

The importance of this decision is obvious. It is true that at the present time the political groups which are subject to persecution in this country are not large in size or great in number. However, it is quite possible in future years that a substantial portion of the community might be subjected to a muzzling process if the tradition of free speech which was so strongly upheld in the *De Jonge* case could be nullified by a Court which was subject to the control of the group or party then in power.

There are two decisions of the Supreme Court that expound the doctrine of freedom of the press in an unusually clear manner, namely, *Near v. Minnesota*,³⁹ and *Grosjean v. American Press Co.*⁴⁰

The *Near* case involved the Minnesota newspaper gag law, which attempted to suppress by injunction the future publication by newspapers and periodicals of charges against public officials of corruption, malfeasance in office, or serious neglect of duty. Although such matters were not specifically named in the statute, the Supreme Court pointed out that its scope was such as to permit of the suppression of any newspaper which made such charges. In holding that a statute which attempted to bring about such a result was unconstitutional, Mr. Chief Justice Hughes said:

"The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

"The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and

33. *Abrams v. United States*, 250 U. S. 616; *Schaefer v. United States*, 251 U. S. 466; *Pierce v. United States*, 252 U. S. 239; *Gitlow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357.

34. *Supra*.

35. 274 U. S. 379.

36. 283 U. S. 339.

37. 81 L. Ed. 189.

38. 81 L. Ed. 194.

39. 283 U. S. 697.

40. 297 U. S. 233.

of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privileges.⁴¹

The other newspaper decision, *Grosjean v. American Press Co.*,⁴² arose out of an attempt by the late Senator Huey Long to stamp out newspapers which were criticizing his policies in Louisiana. The statute in question placed a prohibitive tax upon the advertising revenues of papers having a weekly circulation of twenty thousand copies or more. The tax was aimed at papers of this size because they were the most powerful critics of the Long regime in the State.

In an extensive opinion outlining the history and development of freedom of the press the Supreme Court, through Mr. Justice Sutherland, held that the statute in question was an attempt to suppress criticism and that it was therefore unconstitutional.

These cases illustrate the vital importance of an independent Supreme Court to minority political groups. No one knows when he may be a member of such a group and may find the party in power seeking to suppress his right to criticize.

F. LABOR UNIONS

There have been innumerable decisions of the United States Supreme Court involving the rights of labor, organized and otherwise. It is true that labor, particularly that portion of it which is organized, feels that it has suffered at the hands of the courts. This resentment is due in large part to the use of the injunction and is quite understandable.

The use of the injunction in American labor disputes was almost unknown until late in the nineteenth century. It was in the Pullman strike in 1894 that employers began to make full use of this device, which was credited by Eugene Debs with having broken the strike. When the Supreme Court upheld the Government's injunction in connection with this strike,⁴³ a precedent was set up which greatly influenced and promoted the use of the injunction both at the instance of the Government and of private employers.

The jurisdiction of the Federal courts to grant injunctions in private labor disputes, which had theretofore depended on diversity of citizenship, was greatly enlarged when the Supreme Court held in the *Danbury Hatters* case⁴⁴ that the Sherman Act applied to labor unions. Labor received a further setback when it was held, or at least indicated, that an injunction might be obtained to prevent attempts to persuade men to join a

union in violation of the contracts in which they had agreed not to do so.⁴⁵

There have been legislative attempts, both Federal and State, to offset the effect of the decisions upholding the use of the injunction in labor disputes. Probably the best known of these statutes is the Norris-LaGuardia Act.⁴⁶

Granted that the courts, particularly the lower Federal tribunals, have effected considerable curtailment of the strike weapon by use of the injunction, especially upon *ex parte* affidavits, the fact remains that labor itself is beginning to utilize the equity court as an effective ally in its disputes with employers. In *Texas & New Orleans R. R. v. Brotherhood of Railway and Steamship Clerks*,⁴⁷ the Supreme Court upheld the equitable jurisdiction to grant specific enforcement of statutory requirements that employers shall bargain collectively with representatives chosen by their employees. Similar use of the equity court may doubtless be had under the National Labor Relations Act,⁴⁸ if that Act proves to be constitutional.

Labor's grievance toward the courts is not due solely to the use of the injunction, but may be attributed in part to the decisions of the State and Federal courts which have thrown out, on constitutional grounds, statutes that were passed for the benefit of the working man. There is not time to outline these decisions here, but typical of them, insofar as the Supreme Court is concerned, are the recent 5-4 decisions invalidating the New York State minimum wage law⁴⁹ and the Railway Pension Act.⁵⁰ These are based on an interpretation of the due process clause, the correctness of which is not within the scope of this article.

Granted, however, that labor has met with certain severe reversals at the hands of the Supreme Court, we pause to consider just what it means to the American laboring man to have that tribunal wholly independent of the executive and legislative branches of the Government.

A labor union is a minority group which often comes into violent conflict with the numerically powerful as well as the financially powerful elements of the community. This is because its efforts to improve its status and assert its rights, by use of the strike and other weapons, often arouse the antagonism of the community as a whole. The union is therefore particularly susceptible to persecution by means of unconstitutional laws. No clearer illustration of this can be found than the status of labor in certain countries abroad, where an all-powerful executive, unhampered by judicial restraint, has reduced labor to a state of virtual helplessness.

(Continued on page 295)

41. 283 U. S. 718-720.

42. *Supra*.

43. *In re Debs*, 158 U. S. 564.

44. *Loewe v. Lawlor*, 308 U. S. 274.

45. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229.

46. 29 U. S. C. A. §§ 101, *et seq.*

47. 291 U. S. 548.

48. 29 U. S. C. A. §§ 151, *et seq.*

49. *Morehead v. Tipaldo*, 298 U. S. 587.

50. *Railroad Retirement Board v. Alton R. R. Co.*, 295 U. S. 330.

STATEMENT ON THE PROPOSAL REGARDING THE SUPREME COURT BEFORE THE SENATE JUDICIARY COMMITTEE

The Pending Proposal Should Not Be Adopted Because There Is No Certainty What the Result Will Be, It Would Establish No Definite Policy as to Retirement of Justices in Future, It Would Threaten the Independence of the Supreme Court, under Present Circumstances, and Might Permanently Impair Popular Confidence, and It is Designed to Bring About a Fundamental Change in the Federal System without Submitting the Question to the People—Constitutional Amendment Necessary to Avoid These Objections to the Present Proposal

BY YOUNG B. SMITH

Dean of the Law School of Columbia University

IN order that the views which I shall presently state may not be misinterpreted as being the expressions of one who is not in sympathy with the general aims of the present administration, or of one who is ignorant of or indifferent to the grave problems which confront this nation, or of one who for selfish or other reasons is unwilling to recognize the existence of these problems and to support such action as may be necessary to solve them, let me preface my remarks by stating that I am and always have been a Democrat, that I voted for President Roosevelt as Governor of New York, that I voted for him as President in 1932 and I voted for him again in 1936. Let me further state that I firmly believe that present day conditions require not only many readjustments in the social structure, but also the revision of many of our laws and the reorganization of much of our governmental machinery. Indeed, I am so far from being a defeatist lawyer that I am in favor of making such changes in the Constitution as are necessary to enable both the state and Federal governments to function effectively in promoting the best interests of the American people as a whole. In other words, I am willing to pay the price necessary to make democratic government succeed. It is because I believe in democratic government, and wish to guard it against the forces that have already undermined or destroyed it in many parts of the world, that I am opposed to unnecessarily jeopardizing those basic principles upon which our form of government rests.

I have not come here to discuss the history of our political institutions, or constitutional theory, but I fully realize that the interpretations of the Constitution by a majority of the Supreme Court in certain cases have created a situation that is mani-

festly unsatisfactory and calls for corrective action.

My sole purpose in appearing before the Committee, in answer to your invitation, is to do two things. First, to state the reasons why the proposal regarding the Supreme Court should not be adopted. Second, to urge an alternative method of correcting the present situation which avoids the objectionable features of the pending proposal.

I.

The pending proposal should not be adopted for the following reasons: 1. There is no certainty as to what will be the result if the proposal is adopted. 2. Even if the adoption of the proposal corrected the present situation, it would establish no definite policy regarding the retirement of justices in the future. 3. The adoption of the proposal, in the present circumstances, would threaten the independence of the Supreme Court and might permanently impair the confidence of the people in that Court. 4. The proposal is designed to bring about fundamental changes in the Federal system without submitting the question to the people. I shall discuss these points in the order stated.

1. The proposal, if adopted, will leave the number of justices uncertain. Whether there will be 15, 14, 13, 12, 11, 10 or 9 will depend upon the personal decisions of the individual justices affected. This uncertainty would continue indefinitely until a maximum of 15 was reached. If all six of the justices now over 70 years of age were to retire, and six new justices were appointed to fill the vacancies, under the proposal no additional justices would be appointed and the size of the Court would temporarily remain at 9. But within the course of years the size of the court would again be in doubt, depending upon whether future justices attaining the age of 70 decided to retire. If only 1, 2, 3, 4 or 5 of the 6 justices now over 70

years of age were to retire, under the proposal the vacancy or vacancies would be filled and in addition 5, 4, 3, 2 or 1 additional judges would be appointed, making the total number of justices 14, 13, 12, 11, or 10. Thus there may be an even number of justices with the possibility of a temporary deadlock in the Court. If none of the present justices retires, and six additional justices are added, under the proposal the size of the Court would be permanently increased to 15, but what assurance is there that the present situation would not continue with 8 to 7 or even 9 to 6 decisions?

2. The proposal, while predicated upon the assumption that justices should retire at 70 years of age, does not in fact establish any policy of retirement at any definite age. Of course, compulsory retirement at any age is impossible without a Constitutional amendment. However, to the extent that the proposal induces retirement, it rests upon a dual standard, namely, length of service as well as age. Under the proposal, if a justice were appointed at any time in the future who was, say, 67 or 68 years of age, an additional justice could not be appointed until the former justice had served ten years, thus attaining the age of 77 or 78. Even then an additional justice could not be appointed if the Court consisted of fifteen justices. The inconsistency in this dual standard lies not in the fact that a man over 60 may be appointed to the Court, but that he is encouraged to remain thereon after attaining the age of 70.

3. The present proposal, in view of the reasons given for it and the character of the discussion that has occurred, would, if adopted, tend permanently to impair the confidence of the people in the Supreme Court due to the suspicion, whether well founded or not, that the Court had been made subservient to the Executive and the Congress and was no longer an impartial tribunal especially when the rights of the individual against the government were involved. This is a matter of the utmost importance, in view of the increasing and expanding activities of government in determining what people must or must not do. Moreover, the danger of a partisan court is not unreal. The words of the Declaration of Independence, "he has made judges dependent on his will alone for the tenure of their offices" are a warning from the past, and should cause serious concern to every individual or minority group in this country who would invoke the protection of the Constitution against the tyranny of bureaucracy or of temporary majorities. On this question I can make no stronger argument than to recall the prophetic vision and conclusion of James Bryce in his book "American Commonwealth" written almost fifty years ago:

The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. The President was not permitted to remove the judges, nor

Congress to diminish their salaries. One thing only was either forgotten or deemed undesirable, because highly inconvenient, to determine,—the number of judges in the Supreme Court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate. . . . Suppose a Congress and President bent on doing something which the Supreme court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of justices. The President appoints to the new justices men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.

What prevents such assaults on the fundamental law—assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend. (New Edition, 1918, Vol. I, p. 276.)

4. The present proposal is designed to bring about fundamental changes in the Federal system without submitting the question to the people. The President's last explanation of the proposal makes clear that basic constitutional issues are involved. I refer to his address to the American people delivered over the radio on March 9th. In that address, as I heard it over the radio and as it was reported in the press, he espoused an interpretation of the Constitution to the effect that the power of Congress to provide for the general welfare of the United States, was a general power conferred to meet unforeseen problems of a national character, and he gave the impression that he believed this power was an independent power to provide for the general welfare by other than taxing and spending legislation. After referring to the statement in the preamble to the Constitution that it was intended, among other things, "to form a more perfect union and promote the general welfare," and after describing specific powers given Congress as being "all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action" the President added: "But the framers went further. Having in mind that in

succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States.'"

In quoting the general welfare clause of the Constitution, (Article I, Section 8, paragraph 1) the President omitted a very important part of the clause. As quoted by the President, the power to levy taxes and the power to provide for the general welfare, appear to be separate and independent powers. If the exact and full text of the clause, as it is written, be examined, the power to lay and collect taxes and the power to provide for the general welfare do not appear to be separate and independent powers. The exact language of the clause is as follows:

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

This clause is followed by seventeen other paragraphs enumerating specific powers conferred upon Congress. Furthermore, it must be remembered that among the first amendments to the Constitution were the provisions of Article X which provide:

"The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The interpretation of the general welfare clause by the President is not new. It has been repeatedly advanced and tenaciously held by some. But it has never received approval by the Court, and in the opinion of most statesmen, lawyers, and legal scholars who have written upon the subject, it is untenable since it would destroy the doctrine of enumerated powers, declared by John Marshall to be "acknowledged by all," and would render useless the specification thereof in the succeeding clauses of Section 8 of Article I.

On this point I would like to read a statement which appears in the Brief of the Government submitted to the Supreme Court in the AAA case, signed by the present Attorney General, and the present Solicitor General.

"Three different theories exist as to the proper interpretation to be given the general welfare clause: First, it is said that the clause should be construed as granting Congress power to promote the general welfare independently of the taxing power. This view has generally been rejected." (Page 136)

I agree with the President, that in interpreting the Constitution, the majority of the Supreme Court have, in recent years, read into the Constitution limitations upon the powers of government not required by its language. This can and should be corrected. But with the same frankness I must say that in interpreting the general welfare clause,

the President has likewise read into the Constitution powers conferred upon the Congress which the language of the Constitution does not justify. If the pending proposal be adopted, and if the judges appointed by the President follow his interpretation of the general welfare clause, there would, in time, when such judges constituted a majority of the court, be brought about fundamental changes in what has heretofore been understood to be the powers of the Federal government without submitting the question to the people.

II.

What are the alternatives?

Nothing short of a Constitutional amendment will avoid the four objections to the present proposal.

Many amendments have been suggested. Some of them are concerned with the powers of the Court; some of them are concerned with the powers of Congress; some of them are concerned with the powers of the States. Proposals such as these involve large issues of policy, and undoubtedly would require a considerable time for action by the people. Moreover, some of them involve such difficulties in drafting that it would greatly delay their submission to the people.

But an amendment to deal with the specific issue before this Committee now, can be drafted with ease, can be stated in simple language, and can be acted upon promptly. That would be an amendment fixing the tenure of justices by requiring them to retire at a specified age. Whether the age fixed be 70 or 75, I do not think is a matter of controlling importance, but I would prefer 75. Several proposals along this line have already been made. I shall not discuss the details of such a proposal other than to suggest that if it were felt that the age limit fixed, in its application to justices now on the Court, would result in the retirement of too many justices at once, provision could be made in the amendment for retiring the present justices over a period of years in the order of their seniority. In any event, there should be an accompanying limitation that retirement shall not become effective until a successor qualifies. The provision for qualification of a successor is important, in order to avoid a sudden reduction in the size of the Court before successors to retiring justices had been confirmed by the Senate.

Such an amendment would more surely correct the present situation than would the pending proposal, and would avoid its objectionable features. It would provide the immediate relief that is needed, and at the same time establish a precedent against Congress and the Executive, without an amendment, adding new justices to the Court because they disagree with its decisions.

Such an amendment would not change the number of justices, but it would result in an infu-

sion of new blood into the Court now, as well as establish a definite policy for the retirement of justices in the future.

I realize that, if such an amendment were adopted, the extent to which the powers of the Federal government would be changed by judicial interpretation would for some time remain uncertain. But the change in the personnel of the Court and the attendant risks involved would be by an express mandate of the people and not by the mere act of the Congress and the President.

If the changes in governmental powers through judicial interpretation, or the uncertainty thereof, proved to be unsatisfactory to the American people, the changes or uncertainty could be obviated by other amendments to the Constitution.

The submission now of an amendment which merely limits the tenure of the justices, would not involve controversy as to what should be the powers of the Court, the powers of Congress, and the powers of the States. On the other hand, it would enable a large number of liberal and progressive minded people who supported the President last November, but who are opposing the pending proposal, to aid in bringing about the reforms in the judiciary that he seeks.

If, as has been claimed, the election returns last November were a mandate to bring about these reforms, there should be no difficulty in obtaining an amendment expressly authorizing them. Certainly the submission of an amendment would definitely reveal how the American people feel about the Court issue which would be an excellent guide for future action.

Much has been said about time being of the essence and of the inevitable delays attendant upon the submission of an amendment and action thereon. But prompt action can be obtained if the amendment which I have urged were submitted to conventions, instead of to legislatures, as was done for the first time in the submission of the Twenty-first Amendment, repealing the Eighteenth Amendment. The Twenty-first Amendment was ratified and became effective in less than ten months after its submission.

In this connection, I venture to suggest that Congress has not exhausted its possible resources in dealing with the time element. Is it wholly out of the question for Congress also to provide, in submitting the proposal, that the conventions shall be composed of a given number of delegates at large elected at special elections on a specified date uniform in all the States, and that the conventions shall meet on a designated day thereafter to act upon the proposal? All other matters in connection with the nomination and election of delegates might well be left to the States for determination; and it would seem desirable that the expenses of the special election be paid from the Treasury.

The questions I have just raised I do not under-

take to answer. They are concerned with whether power to provide for conventions resides in Congress or in the States. When for the first time the convention method was utilized, it worked smoothly and quickly. And that was accomplished in spite of the fact that the whole problem of conventions was in that instance left entirely to the States, which had to devise and formulate new legislation in a field where there were no precedents to guide them. So, even if again the matter of calling the conventions were left to the States, the one experiment with the convention method demonstrated its facility and dispatch. If, on the other hand, Congress should conclude that it may take the initiative along the lines suggested above, there is promise of even greater promptness of action through what, in effect, would be a nationwide referendum.

The submission of such an amendment would take the issue regarding the Court out of Congress and place it before the American people where it belongs.

March 25, 1937.

The President's Proposal to Add Six New Members

(Continued from page 241)

Supreme Court of that state with his subservient followers. He already owned the Legislature and with the Supreme Court of the state in his pocket he was secure except for the enforcement of the guarantees of the Federal Constitution by the Federal courts. What happened in Louisiana may happen in other states, and who may say for certain in these troubled times that it may not happen on a national scale.

No truer saying was ever uttered than that "Eternal Vigilance is the Price of Liberty." Every measure that in its consequences breaks down the strength of the guaranties of the Constitution must be resisted. It makes no difference how plausible may be the arguments in its support or how confident we may be as to the motives and purposes of him who proposes the measure. In the words of Jefferson:

"It would be a dangerous delusion if our confidence in the men of our choice should silence our fears for the safety of our rights. Confidence is everywhere the parent of despotism. Free government is founded on jealousy, not in confidence. It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. Our Constitution has accordingly fixed the limits to which, and no further, our confidence will go. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

The chains of the Constitution are, indeed, but ropes of sand if we have not a Supreme Court clothed with power to support the Constitution and with the courage and the independence to do so.

San Francisco.

March 25, 1937.

THE PRESIDENT'S PROPOSALS AS TO FEDERAL JUDICIARY

There Is No Comparable Precedent in Our Legislative History for Such a Wholesale Delegation of Power to Control the Judiciary—If the Citizens of This Republic Desire Thus to Subordinate the Federal Judiciary, Heretofore Regarded as a Coordinate and Independent Branch of the Government, They Should Do It by Constitutional Amendment—The “Constant Infusion of New Blood” Will Be Brought About by Natural Processes But What the President Wants Is the Immediate Transfusion of His Own Blood into the Court

BY HON. FRANK E. ATWOOD

Member of the Jefferson City Bar; Former Justice of the Missouri Supreme Court

THE worst enemy of a democracy is public indifference to the fundamentals of government. It is, therefore, a bright omen of national recovery that the President's recommendations in his recent message to Congress regarding federal courts, and the accompanying bill, immediately became the subject of nationwide debate. It matters not if in the beginning more heat than light is generated. Light comes as heat approaches incandescence. Everybody loves a fight waged in a just cause and this promises to be a good one. The popular decision will not be bad if the people understand the facts.

The President's message of February 5, 1937, contains six principal recommendations which may be briefly stated and characterized as follows:

1. That when any Judge of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years after at least ten years of service, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, appoint one additional judge to such court; provided no more than fifty judges shall be so appointed, nor shall such appointment result in more than fifteen members of the Supreme Court, nor more than two additional judges for a circuit court of appeals or other specified court, nor more than twice the number of judges now authorized for any district or group of districts where judges are appointed for more than one district.

In his message the President cites as a mandate for his recommendations the constitutional provision that the President “shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.” He then assigns as chief reasons why he

judges the measures now recommended necessary and expedient, that “the personnel of the Federal judiciary is insufficient to meet the business before them”; that “the necessity of relieving present congestion extends to the enlargement of the capacity of all the Federal courts”; that “modern complexities call also for a constant infusion of new blood in the courts,” . . . Incidentally, he raises “the question of aged or infirm judges”; speaks of “a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity”; says that “they seem to be tenacious of the appearance of adequacy,” and that the voluntary retirement law “has not proved effective in inducing aged judges to retire on a pension.” The assignments sound plausible and must be met if true.

First, as to “the necessity of relieving present congestion” in Federal courts. Does such a condition exist? In support of his assumption that it does the President cites and appends to his message a letter from the Attorney General. This letter, dated February 2, 1937, abounds in generalities such as “delay in the administration of justice is the outstanding defect of our Federal judicial system”; “justice delayed is justice denied”; “in some jurisdictions the delays in the administration of justice are so interminable that to institute suit is to embark on a life-long adventure”; “statistical data indicate that in many districts a disheartening and unavoidable interval must elapse between the date that issue is joined in a pending case and the time when it can be reached for trial in due course”; “the courts are unable to decrease the enormous backlog of undigested matters”; “reason and necessity require the appointment of a sufficient number of judges to handle the business of the Federal courts.” The most specific and informative matter in the entire letter is this sentence near the close: “The time has come when further legislation is essential.” So,

the President's proposed bill goes on the "must" calendar.

Turning to the Attorney General's appended "statistical information," we find a bare dozen lines of words and figures, including totals, which have little relation and *do not give point* to his suggestions. The first four lines merely present a comparison between the number of cases filed in 1913 and in 1936. The remaining eight lines merely state the number of cases filed and disposed of during the fiscal years 1931-36. Moreover, even these statistics are limited to District courts, and there is no intimation either in the letter or in the statistics appended that there is any congestion whatever in matters lodged in the Supreme Court, although he who runs may read that the principal aim and end of the bill is an early appointment by the President of six new members of that court. If "in some jurisdictions" the delays in the administration of justice are interminable, if "in many districts" they are disheartening and unavoidable, if "the courts are unable to decrease the enormous backlog of undigested matters" and "more than 50,000 pending cases (exclusive of bankruptcy proceedings) overhang the Federal dockets," it is regrettable that the Attorney General did not furnish a supporting bill of particulars from the vast store of facts and figures at his command when advising the President in a matter so important.

It must be presumed that the President when drafting his message knew of the Solicitor General's recent report, which contains this reference to the work of the Supreme Court:

"During its October term, 1935, the Supreme Court disposed of 986 cases on the appellate docket, a larger number of appellate dispositions than at any of the 10 preceding terms, except the 1933 term, when 1,025 cases were disposed of before adjournment."

"... The work of the Court is current and cases are heard as soon after records have been printed as briefs can be prepared."

Surely the personnel of this court has more than "the appearance of adequacy." Every layman knows that such a record cannot be made by men of "lowered mental or physical vigor." If two-thirds of their number have or soon will reach the age of seventy years, they must be well within the exceptional cases, mentioned by the President, in which "judges, like other men, retain to an advanced age full mental and physical vigor." For a decade or more it has been the privilege of members of the American Law Institute from all over the United States to hear the Chief Justice in his opening address at the annual May meetings in Washington report that the Supreme Court is abreast with its docket. As a matter of fact, there is no "present congestion" in that court and no "lowered mental or physical vigor" of its members impeding the dispatch of its business.

As to that court the indisputable facts render these assignments utterly groundless and these alleged reasons have long since been abandoned by the President and other proponents of his bill, who now in effect stand on the single argument that "infusion of new blood in the courts" is necessary.

This quick abandonment of what were treated as major assignments in the President's message naturally raises a question as to the good faith of their advancement, especially when the facts which disprove them must have been well known to the President. His message is either so artlessly or so cleverly drawn that its full meaning may not be gathered from a casual reading. In the early part this thesis appears: "The simple fact is that today a new need for legislative action arises because the personnel of the Federal judiciary is insufficient to meet the business before them." Then follow two pages of persuasive generalities coupled with point blank assertions as to "present congestion" and the disability of "aged or infirm judges." We might agree to the former if the latter were true, but since they appear to be untrue and are no longer even defended there is reasonable cause to believe that they were offered merely as makeweight or matters of inducement, and that the real pattern and purpose of his recommendations is to remake the Federal judiciary according to his own liking by "infusion of new blood into the courts" in a manner other than the time-honored course of filling vacancies.

This is the President's real reason so badly and bitterly stated in his recent "victory dinner" address. The apparently innocent proposition introducing the now abandoned assignments in the beginning of his message fits his present contention like a glove and is only a prelude to his concluding observations on this provision of the bill in which he says: "A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future." The personnel of the Federal judiciary is branded as "insufficient" not because of "present congestion" or "lowered mental or physical vigor" hindering the transaction of business but because it functions as a constitutional branch of government. Shall it so continue? With this single issue in mind we turn to other provisions of the bill and recommendations of the President.

2. That the Chief Justice of the Supreme Court may assign Circuit Judges and District Judges to duties outside their respective circuits or districts.

In his above mentioned letter the Attorney General says: "The newly created personnel should con-

stitute a mobile force, available for service in any part of the country at the assignment and direction of the Chief Justice."

Ample power already exists to so relieve locally congested dockets. In the light of the apparent coercive purpose of the bill, the possibility that the President may shortly appoint as many as fifty judges of his own choosing and a Chief Justice as well, ordinary prudence requires that this provision be defeated.

3. That the Supreme Court be empowered to appoint an administrative assistant, to be known as a proctor, who shall be charged with the duty of watching and reporting as to the calendars and business of all courts of the United States.

In his letter the Attorney General suggests that this functionary be also charged with the duty of "assisting the Chief Justice in assigning judges to pressure areas."

Such an officer might be helpful, although in the light of what has already been said and his probable political utility in "pressure areas" this provision may also well be rejected.

4. The President also recommends that Congress enact a bill requiring the Court to give notice to the Attorney General of the pendency of any action in which the constitutionality of any statute of the United States is drawn in question on substantial grounds, and giving to the Attorney General the right to appear, be heard, present testimony, and take part in such suit, with the rights of a party.

Such a bill is worthy of passage.

5. The President also recommends that Congress enact a bill authorizing the Attorney General, in his discretion, to appeal directly and immediately to the Supreme Court of the United States in any suit or proceeding in which any decision of a Court of the United States is against the constitutionality of a statute of the United States, and giving to appeals so taken precedence over other cases in the Supreme Court.

Such a bill too should pass.

6. In his message the President further says: "In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other Federal judges, has my entire approval."

This is a wise and just provision which long ago should have been made.

So what have we in the President's message? Indorsement of the accompanying bill enabling him as the present Executive branch of government to immediately control the Judicial branch by fifty new appointments. Far less than that number may accomplish his purpose. Also, three meritorious recommendations unrelated to this purpose are thrown in as window dressing.

The power thus sought is without precedent in our national history. It far exceeds the powers al-

ready granted him which the President in one of his "fire-side chats" a few months ago said might shackle our liberties if in wrong hands. In a recent nationwide radio address the aged and distinguished former Justice of the Supreme Court labored to sustain the constitutionality of the seven instances of congressional change in the number of judges comprising that august body, but the technical constitutionality of those changes has never been and is not now seriously questioned. The best proof of the pudding is in the eating. The last of these political expedients was more than sixty-seven years ago and history does not record them among the inspiring experiences of our national life. Such circumstances may seem clever for the moment but they yield bitter fruit in the end. The backbone of America is easily put out of joint by an exhibition of mere cleverness on the part of the President.

It is axiomatic in our land that Americans are citizens and not subjects. It is their privilege and duty to speak truthfully and fearlessly on the shortcomings of those in public office, and no true public servant will be intolerant of such criticism. But it will not do to stop with a mere impugnement of the motives of men in public office, however disingenuous their methods may seem. The assigned reasons to which they cling must be answered.

Coming to the sole reason now urged in defense of the President's message and bill, namely, that "modern complexities call also for a constant infusion of new blood in the courts," let us consider the wisdom of such a grant on that account.

As already suggested, there is no comparable precedent in our legislative history for such a wholesale delegation of power to control the judiciary. The electorate was not previously advised and little dreamed that its vote would be taken as a mandate to seize the reins of another constitutionally independent and coordinate branch of government. Whereas other Presidents in times past, without achieving credit to themselves or benefits to the nation, have prevailed on the Congress to slightly increase or diminish the membership of the Supreme Court, the present incumbent demands the power to dilute the entire Federal judiciary by his immediate appointment of fifty new judges, or such less number as in his judgment may be necessary to validate policies that he and his Congress rather than the courts deem to be constitutional. If the citizens of the United States desire this unbalance of power, if they are determined thus to subordinate the Federal judiciary which has hitherto been regarded as an independent and coordinate branch of the Federal government, so be it, but let it be done by constitutional amendment and not otherwise.

If nothing more than "constant infusion of new blood in the courts" were intended, the reason assigned would hardly be challenged. Such is the law

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JOSEPH R. TAYLOR

MANAGING EDITOR

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THE SUPREME COURT ISSUE

The result of the Association's referendum on the President's proposal with respect to the Supreme Court shows the overwhelming conviction of the Bar that an important constitutional crisis has arisen; that here is a question which rises above partisanship and demands a solution on higher grounds; that the issue is nothing less than the preservation of an independent Supreme Court as a fundamental part of our constitutional structure.

In such a situation it is worse than useless to waste time in canvassing the motives of men and in imputing conscious designs to impair our system of government. The good intentions of those who make these proposals may be assumed. But what counts is the plan itself. And we are left in no doubt whatever as to the end sought to be achieved. Authoritative spokesmen have made it perfectly plain that the plan is to appoint a sufficient number of Justices to the Supreme Court of the United States to secure decisions in cases involving important legislation more satisfactory to the Administration. This means, of course, that men will be selected whose views will be known in advance and who, in the opinion of the appointing power, at least, can be relied on to decide certain types of cases in a certain way.

It is perfectly clear that such a Supreme Court will not be the Court which we have heretofore had. As far as the new Justices are concerned, their impartiality and independence will be suspect from the beginning. They will have been put there for an avowed purpose, and they will have accepted their places under circumstances which indicate a willing-

ness to take a known attitude in cases coming before them for decision. A precedent will have been set for the creation of new places and the appointment of new Justices to secure results in special fields of law which will hardly be neglected by the President's successors. It will not do to say that this fear of executive control is pure speculation. The main drift in the world today is exactly in that direction, and we are far from immune from it, as many circumstances indicate. If the plan is adopted, the subjection of the Supreme Court to Executive and Legislative domination will have been well advanced. Burke in his great speech on "Cconciliation with America" gave us the proper attitude. Of the American colonists he said: "They anticipate the evil and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze."

But we are told that additions to the Supreme Court have been made many times in the past; and an attempt is made to assimilate the present plan for wholesale appointments to the procedure in other days. In fact, the plan as to the Supreme Court was advanced almost in a casual way, as merely a part of a larger design for organizing the entire Federal Judiciary, and as though it were simply a familiar suggestion. But the quick and sure reaction of Senators and others to the proposals soon brought the Supreme Court plan to the center of the stage, and focused the light upon it. And under that light it stood forth as a plan wholly alien to the spirit of our Constitution, totally subversive of the fundamental principle of an independent judiciary, and entirely without precedent in our history.

The last statement requires elaboration. It is totally without precedent, not because Congress has not created new Judgeships in the past, and Presidents have not made appointments to such new places. It is without precedent because never before have new positions on the Supreme Court been created (a) for the avowed purpose of securing special decisions in special types of cases; (b) without a real factual basis involving the actual needs of the Federal Judicial system; (c) in such number as to show plainly, even if other evidence were lacking, that the actual plan was to increase the size of the Court in order to secure a majority of the Justices for special purposes.

Let us look at the reasons for former additions to the Supreme Court membership, and see what sort of precedents they furnish for the present proposal. Mr. Warren in his "The

Supreme Court in United States History" gives them. In Jefferson's time, "impelled by the increase of business and population in the Western Districts of Kentucky, Tennessee and Ohio," Congress created a new circuit—the Seventh. The Supreme Court Justices sat in the circuits in those days, and until much later, and an additional Associate Judgeship was created to take care of this added burden on the Supreme Court. The Court was enlarged in Jackson's time, and for what reason? Two new Circuits were created because "the crowded conditions of the inferior Federal Courts in the States of the West and Southwest had become such as to make relief absolutely necessary, and its refusal a scandalous denial of justice." The number of Associate Judges was increased from six to eight to take care of these additional circuits.

Congress created a new tenth circuit in 1863 and President Lincoln appointed Stephen Johnson Field to the new Associate Judgeship. Grant found the Court reduced to eight by the Act of 1866, which was passed, says Mr. Warren, to deprive President Johnson of the opportunity of filling expected vacancies. In 1869 the Court was increased to nine. Certainly there has been nothing up to now suggesting anything but the natural, proper, orderly and restrained enlargement of the Court, to take care of obvious judicial need. Certainly nothing to indicate appointments based on the expectation that a particular decision in a particular case or class of cases would be influenced.

But wait! We are coming to the Legal Tender Cases, and the charge, revived during the present discussion by some speakers, that Grant appointed Justices to secure a reversal of the first decision on that subject. The charge, if true, would be no justification for any subsequent effort to appoint Justices with the view of obtaining specific decisions. But it is not true. The Act creating the additional Judgeship was passed nearly a year before the first legal tender decision. Two Justices indeed were appointed on the very day (Feb. 7, 1870) that Chief Justice Chase was handing down the opinion in the first case. But that this was nothing more than a coincidence is shown by Mr. Warren, who says:

"The charge has been conclusively answered many times, but still occasionally crops out in attacks on the Court. The facts themselves disprove the accusation. Both judges were nominated on the recommendation of Hoar [Attorney General] who later formally stated that their views on the Legal Tender

Issue had nothing to do with his recommendation. Strong's appointment had been decided on fully a month before February 7, and Bradley's had been urged on the President and favorably considered before Hoar's own appointment in the previous December. The President himself formally stated that he had no advance knowledge as to the decision of the Court, and members of his cabinet later stated the same thing. The newspapers of the time clearly show that there was no leak as to the decision, for their published forecasts were inaccurate. Since practically every State Court (except Kentucky) and every prominent Republican lawyer held the view that the Legal Tender Act was constitutional it would have been impossible for the President to find any State Judge or any lawyer of his own party who differed from Strong and Bradley in the view which they later expressed on the Supreme Bench."

The flimsy contentions that the proposal for increase was predicated largely on the need of the Court for assistance and that Justice was being denied because of the large number of cases in which the Court has refused to take jurisdiction need not detain us. They have been fully answered and refuted by the statement of Chief Justice Hughes which was presented to the Judiciary Committee. The attempted factual basis thus drops away and leaves the proposal to enlarge the Court with no other basis than the will to act so as to change its views.

The plan to add six new members to the Court is not the same in character as the addition of one or two from time to time, as in the past, where the business of the judicial system plainly required it. The mere number would itself be a ground for suspicion. The logic of the proponents of the plan is that if Congress can create one or two additional Judgeships, without justifiable criticism, it ought to be able to create six, or any number, for that matter, without challenge. But there is a point where the quantitative passes into the qualitative. The physical difference between a crust of bread and what makes gluttony is merely quantitative, but the latter has a moral significance wholly alien to the former. So one or two judges appointed under proper circumstances to fill a demonstrated need mean nothing more than the orderly functioning of our constitutional system. But a large number may cause the destruction of fundamental constitutional principles.

But we are told that Congress has the admitted constitutional right to appoint as many members of the Supreme Court as it

pleases. The bare legal right has not been challenged in public discussion of the President's proposal. But it is one thing to say that a branch of our government has a right to do a thing according to the letter of the Constitution, and that it has a moral right under its oath to do it. If the proposed act violates the spirit of the Constitution and threatens the breakdown of an essential part of it, "constitutional morality" certainly forbids it. To act under such circumstances is simply to exercise a brute power. And the spirit is more important than the letter. As long as the spirit of the Constitution is followed, there will be small trouble about the letter, and the great instrument and guarantee of our liberties is safe. But when the letter is followed in disregard of the spirit, catastrophe may be near.

Yes, Congress doubtless may constitutionally add numerous Justices to the Supreme Court and make it the mere instrument of the Executive and the Congress. It may thus destroy a great fundamental without a change in outward form. Nor is this capacity for what we may call constitutional destruction of the Constitution confined to the creation of new Judgeships. In the exercise of its unquestioned constitutional right to legislate, Congress might decline to make any appropriation for the Government, and thus bring the whole structure to the ground. The Executive himself has vast powers under the Constitution which are subject to grave abuse under strict constitutional forms. The question never should be as to the bare legal right, but whether its exercise comports with the spirit of the Constitution.

Before a step is taken which will tend to reduce the Supreme Court to a subordinate state, which will destroy the balance between the branches on which our whole system of Government depends, a step which will set a precedent only too sure to be followed, and probably improved on, in the future, it is well to remember what an independent and impartial Supreme Court has meant to the people. The individual may well ask what guarantee of his individual rights is likely to be found in Executive and Congressional supremacy which can compare with the guarantee offered and still offered by such a Court. Minorities should ask themselves whether they are willing to trust their interests to the changing results of popular elections at which the electorate may be particularly inflamed on some issue affecting them. The Supreme Court has many times stood between them and the excess of power. Will they never need such protection again?

What is more, Congressional and Executive supremacy and Supreme Court subordina-

tion may spell the end of our heretofore successful two-party system of managing political affairs. When minorities find to their sorrow that the Supreme Court no longer is able to protect their fundamental rights against Congressional attack, they may do as they do in Europe, and try to find their protection by group representation in Congress. We may see it made up of many groups, each devoted to its particular interest, and every act the result of compromise. The larger view of national interest would disappear under such circumstances, and the problem of governing would be rendered vastly more difficult. Outside group pressure is too evident now, and is bad enough. But Congress made up of groups would be much worse.

The Supreme Court does not stand in the way of necessary reforms. It stands in the way of headlong haste which disregards constitutional limitations as it construes the Constitution. If its decisions seem to block the way, there is the recourse which the Constitution itself provides. Where the popular will is clearly manifested, an amendment can be secured without too great difficulty or delay. The process is a little slower than remoulding the Court "nearer to the heart's desire," but it has the advantage of leaving us a free and independent Court. That is worth some delay. It also has the advantage of giving the people a chance to say definitely what they think of the matter. They may act wrongly, but at least they will have acted.

"To the people we come sooner or later," says James Bryce in the "American Commonwealth"; "it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend." Surely a proposal which really involves a fundamental constitutional change is too important to be dealt with by a mere statute. Surely such a change should not be adopted without a solemn resort to the ultimate authority in the manner provided by the Constitution. And should the question finally go to the people for decision, it may be devoutly hoped that they will remember that any verdict they may reach should hold to the principle of an independent and coordinate Supreme Court under all circumstances; that they will understand that, after all, they are the warders of their own liberties; and that they will realize when they think of their free government that

*"It was not made with the mountains, it is not one with the deep;
Men, not gods, devised it; men, not gods, must keep."*

MEMBERS OF THE AMERICAN BAR ASSOCIATION DECIDE ITS POLICIES AS TO THE FEDERAL COURTS

Referendum Vote in March on the President's Proposals as to the Federal Courts Strikingly Exemplifies the Efficiency of the Association's New Machinery for Control of Policy by the Rank and File of Members—A Secret Ballot Supervised by the Board of Elections—Surprisingly Large and Gratifying Total Vote—Referendum Vote of Lawyers Not Members of the Association—Significant Results Shown by Analysis of Poll—Younger Lawyers Oppose Increase on Proposed Basis—Representative Character of House of Delegates—Poll of Board of Governors—Discriminating Character of Vote

BY HON. WILLIAM L. RANSOM
Past President of American Bar Association

THE effective new machinery for the control and decision of the policies of the American Bar Association by the rank and file of its members throughout the country was strikingly exemplified by the referendum vote taken in March, to determine the attitude and action of the Association upon the proposals made by the President of the United States as to the Federal Courts. These proposals were and are of vital concern to every citizen, as well as to members of the Bar. They are Nationwide in their implications and effects, and undoubtedly present the most important and far-reaching issue that has been raised in the history of constitutional government in the United States. Upon such an issue, the public and the profession were entitled to have the informed opinion and judgment of American lawyers in every State; and the new structure of the American Bar Association was ready and adequate, for eliciting democratically such an expression of the opinion of the lawyers, without regard to locality, political affiliations, or types of clients served.

It was obvious that upon issues of such transcendent importance to the public, a truly democratic National organization of the profession could speak and act only through the votes of its members, rather than through the determinations of its now representative Board of Governors or its still more representative House of Delegates. Leaders of small and unrepresentative organizations of lawyers, formed to aid personal or special interests in the National sphere, could presume to speak upon such questions without consulting the views of any considerable number of disinterested lawyers; but the truly representative American Bar Association and its affiliated organizations in the States and localities could do no less than ascertain and accept the

instructions of the votes of its members in every state.

Accordingly it was decided that an immediate referendum vote should be taken by mail, to give to the 29,616 members of the American Bar Association the decision as to the action and attitude of the Association itself, upon the pending proposals, and that the Association should proceed also to give to all known lawyers in the United States who are not members of the Association (about 142,000 on available lists) a like opportunity to vote and make known their opinions upon the pending proposals as to the Federal judiciary.

A SECRET BALLOT SUPERVISED BY THE BOARD OF ELECTIONS

After taking the advice (by mail) of members of the House of Delegates, the Board of Governors decided that the referendum ought not to be limited to the proposal made as to the Supreme Court by the President of the United States in his Message to the Congress on February 5, 1937, but should include and cover a separate vote upon the merits of each of the several proposals made by the President as to the Federal Courts. Each member of the Association was to be given an opportunity to register his views upon all of the proposals and to select those which he wished this Association to support and those which he wished this Association to oppose. The official ballot and transmittal letter were prepared accordingly, with provisions ensuring a completely secret ballot, so that no one would be able to know how any member voted upon any question submitted.

Under the provisions of Article V, Section 10, of the new Constitution of the Association, the conducting of the poll and the counting, tabulating, and report of the results of the vote were under the

complete supervision of the Association's Board of Elections, of which the Chairman is the Honorable Edward T. Fairchild, Justice of the Supreme Court of Wisconsin. Judge Fairchild and his associates took personal and continuous charge of all matters within their province, and gave a prodigious amount of time to the task of seeing to it that the safeguards of secrecy and accuracy were observed and that the ballots were promptly recorded and tabulated. Members of the Association and of the profession of law are indebted to the Board of Elections for their diligent and painstaking discharge of duties.

DECISION OF THE ASSOCIATION'S POLICY AND ACTION

Owing to the necessity for a prompt decision of the Association's course in view of the imminent hearings before the Judiciary Committee of the Senate of the United States, the time for the referendum vote of members of the Association had to be limited. The ballots to members were sent out between February 20th and 23rd, with the request that the ballots be returned at once, as no ballots received after March 10th could be included in the Association's vote.

The 29,616 ballots went to the members of the Association in every State, the District of Columbia, and in the territorial, insular and foreign group, at a time when many members were absent from their offices on winter vacations or on business, and so did not receive their ballots in time to vote. Nevertheless, a total of 19,506 ballots were received on or before March 10th. Of this total, 370 ballots were not properly authenticated, and so could not be counted. This left 19,136 votes, or 65 per cent of the Association membership, to be counted in the referendum. The Board of Elections also tabulated separately the unauthenticated ballots and the 170 ballots received after March 10th, but these are not included in the totals.

Under all of the circumstances as to the necessary limits of time the polling of 19,136 votes out of a total of 29,616 members is deemed a surprisingly large and gratifying total. The results gave the Officers, Board of Governors, and Committees the necessary instructions as to the attitude of Association members upon the pending proposals.

THE REFERENDUM VOTE OF LAWYERS NOT MEMBERS OF THE ASSOCIATION

In the belief that the voice and opinion of American lawyers should be ascertained and made known in a thoroughly representative way, upon issues vitally affecting the Courts of the United States, the Board of Governors authorized the Board of Elections to conduct a like poll of the lawyers who are not now members of the Association (about 142,000 on known lists).

In view of the greater number of votes involved

and the probable unfamiliarity of non-members with the processes of referendum voting by mail, it seemed necessary to allow a greater period of time within which non-members might return their ballots. The same subjects were submitted to non-members as to members, in separate questions, except that the sixth question submitted to members (as to the Sumners Bill permitting voluntary retirement of Justices of the Supreme Court) was omitted from the non-member ballot, this bill having become law meanwhile.

The referendum of non-members will close with the ballots received on April 10th. In their discretion, the Board of Elections may make an intermediate tally and report of the ballots received as of an earlier date.

With the completion of this further referendum, more than 171,000 American lawyers, without distinction as to membership in the Association, will have had an opportunity to vote their views upon the proposals affecting the Federal Courts.

Many of the State and local Bar Associations affiliated with the American Bar Association have meanwhile conducted independent polls of their memberships, for the information of the representatives of their States or localities in the Congress. The results of these independent polls have also been gathered and will be tabulated and announced.

Aside from the American Bar Association and its affiliated associations, no other organization attempting to speak for the legal profession or any special part of it has announced the result of any poll of its membership, or of lawyers generally upon the pending proposals as to the Courts.

In taking a poll of its 29,616 members and a further poll of the more than 142,000 non-members, the American Bar Association has made a significant and useful contribution to the public discussion of the issues as to the judiciary. The day has passed when thoroughly unrepresentative individuals or purported organizations can claim to speak for any considerable number, or the great public-spirited element, of the legal profession, without providing the means whereby the opinion of the lawyers can be democratically ascertained and presented.

SIGNIFICANT RESULTS SHOWN BY ANALYSIS OF THE POLL

Aside from giving effect to democratic and proper method of determining the Association's attitude and action upon a major issue affecting the administration of justice and the American juridical system, the referendum has served a useful public purpose, in making known the views of the rank and file of lawyers upon the submitted proposals. It has often been asserted, and sometimes feared, that there was little or no unity of opinion among American lawyers on major issues; that the leadership, Committees, etc., of the American Bar Association

are not truly representative of its 29,616 members; and that the policies of the Association reflect only the views of a relatively few lawyers, in the largest cities, and that the views of these few lawyers are in turn controlled or influenced by their principal clients. Those who were familiar with the actual conduct of the affairs of the Association, and had come closely in contact with the lawyers at home in their States, knew that such imputations were unfounded and usually emanated from individuals and organizations lacking in any of the elements of representative character and democratic accountability. Analysis of the recent referendum shows that such charges have been and are unfounded, as probably their authors well know.

The votes taken and tabulated by States, upon the six submitted proposals, show that the unified opinion of the rank and file of the members of the Association is uninfluenced by locality or by normal political affiliations, is beyond influence by clients or by outstanding individual lawyers, and knows no differentiation between the "big cities" and the rest of the country. If anything, the views of the lawyers in States which do not contain large cities are shown to be ascendant in the policies of the Association.

In every one of the 48 States and the District of Columbia, the members of the Association voted strongly against the proposed increase in the Supreme Court. Although the over-all vote was slightly more than six to one in opposition, Nebraska, Maine, South Dakota and Vermont were more than 14 to 1 in opposition; Colorado was about 9 to 1; Washington State, more than 8 to 1; Iowa, more than 10 to 1; Rhode Island, about 10 to 1; Montana, more than 7 to 1; Oregon, 12 to 1. On the other hand, the vote in the District of Columbia was a little more than 4 to 1; in New York, about 6 to 1; in Illinois, less than 7 to 1; in Florida and Mississippi, about 3 to 1, with the vote in Florida slightly less than 3 to 1, this being the lowest ratio in any State. As might be expected, the ratios in the South were generally below the average in the country as a whole, but disapproval of the increase in the Supreme Court was emphatically voted in every State.

THE YOUNGER LAWYERS OPPOSE THE INCREASE IN THE NUMBER OF JUDGES ON THE BASIS PROPOSED

At the request of the National Junior Bar Conference, the referendum polled separately, with ballots of a different color, the members of the Association who are under 36 years of age. The poll showed that the younger lawyers throughout the country had voted in about the same way as their seniors, the results being the same as to each question submitted. The younger lawyers disapproved the increase in the Supreme Court by a vote of 506 for and 2113 against—or more than four to one.

Of especial significance was the heavy vote of the younger lawyers against the proposal as to the Supreme Court, in States which contain no large cities. Colorado, New Mexico and North Dakota voted unanimously against the Supreme Court proposal. Oregon was 11 against and 1 vote for. Nebraska voted 27 against and 2 for. South Dakota voted 15 against and 1 for. On the other hand, the vote of the younger lawyers in New York State was less than 3 to 1 against, and in Illinois less than 4 to 1 against. In Wyoming, 3 votes were cast for the proposal and 1 against; Wyoming was the only State in which a majority of the younger lawyers supported the President's proposal as to the Supreme Court. The total vote in Wyoming was 7 for and 32 against.

REPRESENTATIVE CHARACTER OF HOUSE OF DELEGATES CONFIRMED

That the newly created House of Delegates faithfully represents the opinion of the Association membership upon the major issues as to the Courts is confirmed by a comparison of the results of the separate poll of the members of the House with the results of the poll of the whole membership. In every instance, the members of the House voted as did the membership of the Association, upon the submitted questions. The same observation is true also as to the smaller administrative body known as the Board of Governors, composed of one member elected from each Federal judicial circuit, together with the National officers of the Association.

On the 138 ballots returned by members of the House of Delegates, composed of Delegates chosen by State and local Bar Associations and affiliated organizations of the legal profession, Section Chairmen, etc., together with one State Delegate representing the American Bar Association members in each State and the District of Columbia, seven votes were cast for and 130 votes against, the proposed increase in the membership of the Supreme Court. As to the proposed increase in the other Federal Courts, the vote of the House was 18 for and 118 against.

On the other submitted questions, a majority of the House approved each of the pending proposals. The high vote was 88 for and 48 against, as to the assignment of judges to duties outside their district, and the low vote was 79 for and 56 against the proposed creation of the office of proctor. A vote of 85 for and 47 against approved the Sumners Bill, now law.

Fourteen members of the Board of Governors opposed the increase in the Supreme Court, with none in favor. One member favored the increase in the other Federal Courts. The other submitted proposals were approved, the negative votes ranging from two to five.

These separate polls of the House of Delegates and the Board of Governors show that those bodies

are in accord with the views expressed by the votes of the Association membership.

DISCRIMINATING CHARACTER OF THE VOTE POLLED UPON THE VARIOUS PROPOSALS

That the members of the Association are in no mood of mere opposition to proposals for change and improvement in the administration of justice in the Federal Courts was demonstrated by the favorable vote upon four of the submitted proposals, along with the decisive vote against increasing the membership of the Courts on the basis proposed. No matter how intensely the Association members felt as to the proposed dilution of the Supreme Court, they voted open-mindedly upon other proposals.

As was expected, some members of the Association who opposed the Supreme Court increase nevertheless favored the appointment of additional judges for the other Federal Courts. The proposed increase as to the Courts other than the Supreme Court was favored by 4,048 members with 14,401 in opposition, whereas only 2,563 approved the Supreme Court increase, with 16,132 in opposition.

In contrast, the proposal as to the assignments of Circuit and District Judges was approved by a vote of 11,462 to 6,837; the proposed creation of the office of proctor, by a vote of 10,707 to 7,414; the right of intervention by the Attorney-General, by a vote of 10,637 to 7,613; and the right of direct appeal by the Attorney-General, by a vote of 11,397 to 6,852.

The opinion of Association members was in accord with that of the Congress and the President, as to the Sumners Bill to permit voluntary retirement of Justices of the Supreme Court. The vote was 14,482 for and 3,419 against, or in ratio of more than four to one. The bill has meanwhile become law.

Although the reports adopted by several State and local Bar Associations, notably the Association of the Bar of the City of New York, show there is room and reason for argument as to the desirability of some of the proposals approved by a majority of the Association members, the significant fact is that the majority of the votes revealed a readiness to approve and accept changes which were offered in the guise of improvements in the Federal system of justice, so long as the independent and non-political character of the Courts is not destroyed or endangered. On that vital issue, the opposition of Association members completely disregards normal partisan and sectional alignments and is overwhelming and decisive throughout the country.

THE FURTHER POLL OF LAWYERS NOT MEMBERS OF THE ASSOCIATION

Members of the Association have by their votes decided its attitude and action upon these major issues. These decisions will be expressed and given

effect, in the name of the Association, at the hearings before the Judiciary Committee in April.

Under its present policies and leadership, the Association is interested also in the views and wishes of the 142,000 lawyers who are not members of the Association. It is desirable that their opinions be likewise ascertained and expressed, along with those of the members of the National organization of the Bar.

It is true that these non-members have had no place or part in the Association's long battle for improvement of the administration of justice and for an independent and competent judiciary. Undoubtedly these non-members include most of the great number of lawyers who are in the employ of government or are active in the work of political organizations. Whatever the opinion of these non-members may be upon the pending issues, it should be registered and made known, as a part of the opinion of the whole profession of law. If the views of the 29,616 members of the Association are at variance with those of the rest of the profession, that fact should be ascertained and taken into account. As to the preponderant views of the lawyers who are members of the Bar Associations, local and State or National, the polls thus far taken leave no doubt.

During the past two years and more, it has been my privilege to meet and talk with a great many lawyers in many States and localities, throughout the United States. Almost everywhere, I found that the paramount importance of an independent, courageous, competent judiciary was uppermost in the minds of members of the profession, long before the pending proposals were brought forward in February. It was these views, so widely and strongly held by the rank and file of lawyers in all parts of the country, that I tried to crystallize and express, in their behalf in Boston on August 24, 1936, in saying:

"This is a time when the people are thinking about their courts, and are gaining a new realization that the courts are bulwarks of liberty, liberty vouchsafed by sacred constitutional pledge, and that the processes of judicial decision play a great part in preserving fundamental human rights and the essence of free government. For my own part, I believe that the issue which, above all others, is stirring the consciousness of the American people, and should command the militant support of all lawyers, is that there shall be preserved unimpaired the great heritage of our people—impartial, independent, non-partisan, non-political and law governed courts, made up of courageous judges controlled only by their own judgment and their own conscience—judges selected for their qualifications for judicial office, judges secure in tenure, judges who owe no fealty to political programs or precon-

(Continued on page 277)

COUNT OF JUNIOR AND SENIOR BALLOTS COMBINED

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Alabama	17	127	28	116	87	55	80	59	93	48	95	46	105	34	144
Arizona	16	99	27	87	61	53	60	52	61	54	66	49	89	22	115
Arkansas	27	110	45	92	95	43	82	51	78	60	100	38	116	19	139
California	209	1,077	321	954	891	372	855	390	677	583	744	516	994	233	1,292
Colorado	24	215	36	203	143	89	117	118	121	114	125	107	184	48	240
Connecticut	30	305	50	278	224	100	207	111	186	146	199	128	260	66	336
Delaware	9	58	15	50	40	25	36	29	42	23	46	20	58	9	67
Dist. Columbia	137	573	202	497	484	214	465	222	400	289	440	249	640	52	712
Florida	92	262	135	211	230	118	206	140	201	144	233	111	290	50	355
Georgia	31	185	54	160	126	88	114	96	116	95	129	80	171	38	215
Idaho	10	49	14	44	39	19	34	24	27	32	32	27	43	13	60
Illinois	209	1,427	327	1,288	972	622	905	673	883	703	918	666	1,149	403	1,640
Indiana	46	298	69	272	197	141	174	156	195	142	212	125	257	74	344
Iowa	32	346	58	320	228	149	179	191	199	172	195	179	289	81	380
Kansas	19	198	30	181	110	103	89	120	90	121	107	104	164	44	218
Kentucky	41	209	58	186	136	107	129	107	152	86	165	76	173	65	251
Louisiana	37	217	71	182	177	71	156	97	141	108	175	77	206	43	254
Maine	7	103	17	91	51	51	45	59	48	58	52	55	71	33	111
Maryland	37	250	66	209	152	123	145	127	161	113	171	101	227	46	287
Massachusetts	73	728	133	647	486	265	467	279	473	283	488	270	584	143	802
Michigan	64	469	103	423	331	195	348	171	329	195	337	189	414	98	533
Minnesota	70	428	111	379	274	214	295	190	305	179	301	180	372	97	500
Mississippi	30	98	37	91	73	54	64	61	42	85	63	64	104	23	128
Missouri	115	648	167	594	450	309	428	327	414	344	473	284	623	127	799
Montana	7	50	11	44	40	17	32	24	30	27	34	23	49	6	57
Nebraska	15	235	23	224	126	117	104	139	132	111	146	99	170	69	250
Nevada	13	68	24	57	55	25	56	23	48	35	51	32	62	17	83
New Hampshire	11	75	19	64	57	27	54	29	50	33	51	32	69	11	86
New Jersey	98	488	142	435	409	167	382	192	362	210	392	182	432	124	590
New Mexico	9	43	14	38	36	16	33	19	24	27	28	24	41	10	52
New York	338	2,196	511	1,989	1,578	891	1,427	1,039	1,631	849	1,683	799	2,054	382	2,538
North Carolina	28	147	46	127	113	58	108	62	113	57	114	57	140	24	176
North Dakota	7	45	11	39	24	28	24	27	26	25	32	19	37	13	52
Ohio	81	803	134	743	556	316	495	358	475	395	478	381	666	184	888
Oklahoma	59	279	88	240	197	139	192	142	176	159	188	148	263	69	341
Oregon	13	157	26	139	110	54	78	84	94	66	105	58	139	21	170
Pennsylvania	126	909	219	800	560	453	566	439	643	363	638	372	780	198	1,037
Rhode Island	11	120	24	106	103	25	90	38	96	33	86	45	106	19	133
South Carolina	20	97	28	89	67	50	62	54	68	49	80	36	100	18	119
South Dakota	6	87	15	78	42	48	44	46	46	43	52	39	72	17	94

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Tennessee	36	149	51	131	108	77	96	82	112	67	129	52	145	30	192
Texas	93	442	148	385	334	195	338	187	293	232	344	176	435	88	538
Utah	19	113	24	108	75	54	71	55	49	79	69	58	101	22	132
Vermont	5	76	7	71	43	34	38	38	33	43	43	34	64	10	81
Virginia	57	254	87	224	180	132	183	128	192	117	204	106	268	39	313
Washington	30	244	61	212	191	83	163	102	133	137	160	109	208	54	276
West Virginia	31	180	40	165	104	100	103	99	109	95	125	77	146	45	211
Wisconsin	56	349	105	297	265	126	258	133	236	158	263	130	311	72	406
Wyoming	7	32	9	29	20	18	19	18	21	17	23	15	26	11	39
Terr. Group	5	14	7	11	11	7	11	8	11	8	11	8	14	5	19
Foreign		1		1	1			1		1	1		1		1
Total	2,563	16,132	4,048	14,401	11,462	6837	10,707	7,414	10,637	7,613	11,397	6,852	14,482	3,419	18,766

COUNT OF JUNIOR BALLOTS

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No.	Yes	No	Yes	No	
Alabama	3	28	6	25	24	7	23	8	22	9	18	13	25	6	31
Arizona	4	17	7	14	11	10	13	8	13	8	13	8	15	6	21
Arkansas	8	32	12	28	26	14	27	13	* 21	19	26	14	32	7	40
California	38	163	57	142	148	50	157	39	122	76	128	71	165	29	201
Colorado	0	20	1	19	13	7	12	7	8	11	11	8	14	4	20
Connecticut	1	31	1	31	25	6	26	6	14	17	17	14	25	7	32
Delaware	4	17	7	14	16	5	17	4	13	8	15	6	18	3	21
Dist. Columbia	26	74	40	60	75	24	81	19	67	33	72	27	93	6	100
Florida	25	40	31	33	48	17	44	19	41	23	48	16	54	5	65
Georgia	7	27	9	25	19	15	21	13	20	14	24	10	30	4	34
Idaho	2	8	4	6	7	2	7	2	5	5	5	5	8	1	10
Illinois	33	122	52	100	106	45	106	45	94	58	91	62	119	26	156
Indiana	7	40	18	29	33	14	32	14	32	15	35	12	41	3	47
Iowa	8	42	11	39	33	17	31	19	30	20	28	22	42	8	50
Kansas	2	44	3	42	20	26	19	24	21	25	23	22	38	7	46
Kentucky	6	36	11	31	25	15	29	13	23	18	26	15	29	13	42
Louisiana	7	32	14	25	25	12	23	16	23	16	28	11	31	8	39
Maine	2	20	4	18	10	11	12	11	13	10	12	11	19	4	23
Maryland	5	20	9	16	17	7	17	6	16	8	15	8	22	2	25
Massachusetts	14	85	23	74	69	29	70	27	69	29	65	33	75	18	99
Michigan	12	62	21	52	55	19	52	21	55	18	57	16	59	13	74
Minnesota	11	49	18	42	41	18	47	13	45	14	42	17	48	8	60
Mississippi	9	22	14	17	19	12	21	10	11	20	16	15	27	4	31
Missouri	25	115	33	107	98	41	97	42	90	49	97	41	127	11	140
Montana	2	6	4	4	7	1	5	3	4	4	6	2	7	1	8

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Nebraska	2	27	3	25	13	14	17	12	20	9	16	13	20	8	29
Nevada	2	5	4	2	5	1	4	1	4	3	4	3	6	1	7
New Hampshire	5	21	10	16	16	10	18	8	15	11	15	11	23	2	26
New Jersey	44	112	58	98	135	20	123	32	116	39	117	38	123	24	157
New Mexico	0	10	2	8	6	4	5	5	5	5	4	6	7	3	10
New York	60	169	80	147	176	51	174	53	172	57	170	55	198	22	230
North Carolina	7	21	8	19	19	8	17	10	16	11	18	9	22	4	28
North Dakota	0	8	2	6	4	4	5	3	5	3	5	3	7	1	8
Ohio	16	108	23	101	89	35	81	40	76	45	78	42	103	18	124
Oklahoma	6	44	12	37	25	24	25	25	23	25	26	23	34	13	50
Oregon	1	11	2	10	5	7	4	7	7	4	7	5	8	4	12
Pennsylvania	25	96	39	81	84	34	87	29	88	29	88	31	95	17	121
Rhode Island	4	20	5	19	20	3	21	3	20	4	16	8	23	1	25
South Carolina	5	19	5	19	13	11	15	9	16	8	17	7	22	2	24
South Dakota	1	15	4	12	5	11	9	7	11	6	12	5	13	4	17
Tennessee	4	17	9	12	14	7	14	6	18	3	20	1	19	2	21
Texas	16	59	28	47	51	23	53	20	39	35	46	26	59	12	75
Utah	7	33	8	32	24	16	22	17	15	23	24	15	27	8	40
Vermont	3	12	2	12	9	5	8	6	9	5	10	4	13	1	15
Virginia	13	58	24	47	42	28	45	25	47	22	50	19	63	7	71
Washington	5	24	15	14	25	4	19	8	16	13	17	12	26	1	29
West Virginia	3	24	5	21	18	8	17	9	14	13	18	9	20	6	27
Wisconsin	12	44	21	34	40	14	42	14	38	18	42	14	46	8	56
Wyoming	3	1	3	1	4	0	4	0	3	1	3	1	3	1	4
Foreign	1	3	3	1	3	1	3	1	2	2	3	1	3	1	4
Total	506	2,113	785	1,814	1,815	767	1,821	752	1,667	921	1,744	840	2,146	375	2,625

Members of American Bar Association Decide Its Policies

(Continued from page 274)

ceived views, judges who give the people the benefit of deliberate, detached and disinterested judgment.

"The Bar and the people should face frankly the issue of a competent and truly independent judiciary. If courts are to be reconstituted to serve preconceived theories, if judges are to be chosen to reward partisan or factional service and are to remain active in partisan or factional contests, and if judges on the bench are to bow weakly to supposed popular demands for the breaking-down of the rights of some citizens in order to favor other citizens, then constitutional safeguards become of no

avail and the very keystone of the American form of government is in danger. If the judge on the bench appears responsive still to politics and politicians, the appearance if not the actuality of impartial and impersonal justice is destroyed. If the judge on the bench makes a hodge-podge of human rights in order to serve supposed social ends, the 'blessings of liberty' are to that extent forfeit. The people, not their courts, decide and determine the public policy of the United States as embodied in the fundamental law; the people make and change their Constitution, according to their deliberate judgment; but we shall lose the distinctive feature of our institutions if the courts are denied the right and duty to speak on fundamental questions or are made subservient to the demands of transient political control. Here is an issue we should nail to the mast-head, and put and keep in first place."

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Tennessee	36	149	51	131	108	77	96	82	112	67	129	52	145	30	192
Texas	93	442	148	385	334	195	338	187	293	232	344	176	435	88	538
Utah	19	113	24	108	75	54	71	55	49	79	69	58	101	22	132
Vermont	5	76	7	71	43	34	38	38	33	43	43	34	64	10	81
Virginia	57	254	87	224	180	132	183	128	192	117	204	106	268	39	313
Washington	30	244	61	212	191	83	163	102	133	137	160	109	208	54	276
West Virginia	31	180	40	165	104	100	103	99	109	95	125	77	146	45	211
Wisconsin	56	349	105	297	265	126	258	133	236	158	263	130	311	72	406
Wyoming	7	32	9	29	20	18	19	18	21	17	23	15	26	11	39
Terr. Group	5	14	7	11	11	7	11	8	11	8	11	8	14	5	19
Foreign		1		1	1		1		1		1		1		1
Total	2,563	16,132	4,048	14,401	11,462	6,837	10,707	7,414	10,637	7,613	11,397	6,852	14,482	3,419	18,766

COUNT OF JUNIOR BALLOTS

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Alabama	3	28	6	25	24	7	23	8	22	9	18	13	25	6	31
Arizona	4	17	7	14	11	10	13	8	13	8	13	8	15	6	21
Arkansas	8	32	12	28	26	14	27	13	* 21	19	26	14	32	7	40
California	38	163	57	142	148	50	157	39	122	76	128	71	165	29	201
Colorado	0	20	1	19	13	7	12	7	8	11	11	8	14	4	20
Connecticut	1	31	1	31	25	6	26	6	14	17	17	14	25	7	32
Delaware	4	17	7	14	16	5	17	4	13	8	15	6	18	3	21
Dist. Columbia	26	74	40	60	75	24	81	19	67	33	72	27	93	6	100
Florida	25	40	31	33	48	17	44	19	41	23	48	16	54	5	65
Georgia	7	27	9	25	19	15	21	13	20	14	24	10	30	4	34
Idaho	2	8	4	6	7	2	7	2	5	5	5	5	8	1	10
Illinois	33	122	52	100	106	45	106	45	94	58	91	62	119	26	156
Indiana	7	40	18	29	33	14	32	14	32	15	35	12	41	3	47
Iowa	8	42	11	39	33	17	31	19	30	20	28	22	42	8	50
Kansas	2	44	3	42	20	26	19	24	21	25	23	22	38	7	46
Kentucky	6	36	11	31	25	15	29	13	23	18	26	15	29	13	42
Louisiana	7	32	14	25	25	12	23	16	23	16	28	11	31	8	39
Maine	2	20	4	18	10	11	12	11	13	10	12	11	19	4	23
Maryland	5	20	9	16	17	7	17	6	16	8	15	8	22	2	25
Massachusetts	14	85	23	74	69	29	70	27	69	29	65	33	75	18	99
Michigan	12	62	21	52	55	19	52	21	55	18	57	16	59	13	74
Minnesota	11	49	18	42	41	18	47	13	45	14	42	17	48	8	60
Mississippi	9	22	14	17	19	12	21	10	11	20	16	15	27	4	31
Missouri	25	115	33	107	98	41	97	42	90	49	97	41	127	11	140
Montana	2	6	4	4	7	1	5	3	4	4	6	2	7	1	8

	Ques. 1A		Ques. 1B		Ques. 2		Ques. 3		Ques. 4		Ques. 5		Ques. 6		Total Ballots Cast
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	
Nebraska	2	27	3	25	13	14	17	12	20	9	16	13	20	8	29
Nevada	2	5	4	2	5	1	4	1	4	3	4	3	6	1	7
New Hampshire	5	21	10	16	16	10	18	8	15	11	15	11	23	2	26
New Jersey	44	112	58	98	135	20	123	32	116	39	117	38	123	24	157
New Mexico	0	10	2	8	6	4	5	5	5	5	4	6	7	3	10
New York	60	169	80	147	176	51	174	53	172	57	170	55	198	22	230
North Carolina	7	21	8	19	19	8	17	10	16	11	18	9	22	4	28
North Dakota	0	8	2	6	4	4	5	3	5	3	5	3	7	1	8
Ohio	16	108	23	101	89	35	81	40	76	45	78	42	103	18	124
Oklahoma	6	44	12	37	25	24	25	25	23	25	26	23	34	13	50
Oregon	1	11	2	10	5	7	4	7	7	4	7	5	8	4	12
Pennsylvania	25	96	39	81	84	34	87	29	88	29	88	31	95	17	121
Rhode Island	4	20	5	19	20	3	21	3	20	4	16	8	23	1	25
South Carolina	5	19	5	19	13	11	15	9	16	8	17	7	22	2	24
South Dakota	1	15	4	12	5	11	9	7	11	6	12	5	13	4	17
Tennessee	4	17	9	12	14	7	14	6	18	3	20	1	19	2	21
Texas	16	59	28	47	51	23	53	20	39	35	46	26	59	12	75
Utah	7	33	8	32	24	16	22	17	15	23	24	15	27	8	40
Vermont	3	12	2	12	9	5	8	6	9	5	10	4	13	1	15
Virginia	13	58	24	47	42	28	45	25	47	22	50	19	63	7	71
Washington	5	24	15	14	25	4	19	8	16	13	17	12	26	1	29
West Virginia	3	24	5	21	18	8	17	9	14	13	18	9	20	6	27
Wisconsin	12	44	21	34	40	14	42	14	38	18	42	14	46	8	56
Wyoming	3	1	3	1	4	0	4	0	3	1	3	1	3	1	4
Foreign	1	3	3	1	3	1	3	1	2	2	3	1	3	1	4
Total	506	2,113	785	1,814	1,815	767	1,821	752	1,667	921	1,744	840	2,146	375	2,625

Members of American Bar Association Decide Its Policies

(Continued from page 274)

ceived views, judges who give the people the benefit of deliberate, detached and disinterested judgment.

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avail and the very keystone of the American form of government is in danger. If the judge on the bench appears responsive still to politics and politicians, the appearance if not the actuality of impartial and impersonal justice is destroyed. If the judge on the bench makes a hodge-podge of human rights in order to serve supposed social ends, the 'blessings of liberty' are to that extent forfeit. The people, not their courts, decide and determine the public policy of the United States as embodied in the fundamental law; the people make and change their Constitution, according to their deliberate judgment; but we shall lose the distinctive feature of our institutions if the courts are denied the right and duty to speak on fundamental questions or are made subservient to the demands of transient political control. Here is an issue we should nail to the mast-head, and put and keep in first place."

THE MOST IMPORTANT QUESTION SINCE THE CIVIL WAR

To Lawyers the Independence of the Judiciary Should Be as Indisputable as the Multiplication Table, but the Surprising Thing Is That Some of Them Have Apparently Lost the Sense of Its Importance—The Long Battle for Independent Judges Seen in Historical Perspective—Failure of Many of Foreign Birth to Realize What an Extent the Supreme Court Has Been the Protector of the Liberties of Individuals and the Rights of Minorities—Discussions of the Past Few Weeks Have Had Great Educational Value—A Constitutional Amendment Giving the People the Opportunity to Pass on the Proposal Is the Wiser Course—Two Proposed Amendments Considered

CHARLES C. BURLINGHAM

Member of the New York Bar

THE President's proposal to increase the size of the Supreme Court has raised the most important question presented to the American people since the Civil War. That question is not the need or the wisdom or the constitutionality of the N.R.A., the A.A.A., or any other New Deal legislation. Nor is it the size of the Court or the age of the judges. It is whether the Supreme Court of the United States shall be controlled or independent.

In this brief article addressed to lawyers, I shall not discuss questions of constitutionality, the decisions of the Court, the line of division between the so-called liberal and the conservative justices or the needs of the Nation, or the policies of the President. For frankness' sake and in order that whatever bias I may have shall not be concealed, I may say that I am a Democrat who voted for Mr. Roosevelt twice for Governor and twice for President, that I am in sympathy with his policies, that I have been critical of some of the decisions of the Supreme Court and that I think that certain amendments to the Constitution are needed.

To us lawyers the independence of the judiciary is, or should be, as indisputable as the multiplication table, but the surprising, and, to many of us distressing, thing that has come out of the discussions of the last two months is that so many members of the Bar have apparently lost the sense of the importance of this independence, and many seem sadly ignorant of the history of its development. The long battle for an independent judiciary, begun early the reign of James I and fought to a finish under his grandson, James II, was finally embedded in the English constitution in the Act of Settlement of 1701, in which it was provided that judges should be commissioned during good behavior and be removable only upon the addresses of both Houses of Parliament.

But the Act of Settlement had no application to the colonies. Parliament had no disposition to restrict

the Crown's prerogative abroad, and it was well settled that acts of parliament did not apply in the King's dominions overseas unless it was so stated specifically.

During the English civil wars and the period of the Commonwealth, the American colonies were weak and poor and their trade was so slight as not to excite any great interest in the home government. The charters issued to companies or proprietors usually gave them the right to pass laws not repugnant to the common law. During the 17th Century the colonies set up their own courts and elected or appointed their own judges. With the growing prosperity of the plantations, the British Board of Trade, established in 1696, determined to bring the colonial laws into conformity with the British common law. This made a trained bench necessary and the royal governors appointed the judges. As in England theoretically the King was present in the Court of King's Bench, so in the Colonial courts he was present by virtue of his prerogative.

In New York the royal governor found it impossible to obtain from the assembly a judiciary act satisfactory to the Crown and he therefore established a judicial system by ordinance. He appointed judges and with his Council formed the highest court of appeal in the Province. He himself sat as chancellor and exercised alone the wide discretionary power of that office. In Pennsylvania also and in Maryland in the early part of the 18th Century there were continuous struggles between the governors and the assemblies.

In 1752, the Board of Trade revised the instructions to the governors, and, among other things, ordered that the commissions of the judges should be *at pleasure*. The Pennsylvania Assembly passed a law requiring commissions to be *during good behavior*. The bill was promptly disallowed. In New Jersey the assembly refused to vote salaries to the judges unless the governor issued commissions during good behavior. He reluctantly agreed, and the result was that he was re-

called. In New York in 1762 Lieutenant-Governor Colden was persuaded, against his will, to sign an appropriation bill providing salaries for judges only on condition that they would accept good behavior commissions, but the Board of Trade insisted on commissions at the pleasure of the king and ordered the salaries of the judges to be paid out of Crown revenues. In 1765 the British Parliament began direct taxation of the colonies. The first charge on the Crown revenues was to be the civil list, which included the salaries of the judges.

Thus the judges were made independent of the Colonial assemblies, and their appointment, continuance in office and salaries were made dependent solely on the pleasure of the King. In order to enforce the increasingly severe trade laws and avoid jury trials the powers of the Vice-Admiralty Courts were expanded. When, in 1774, popular resistance to the King's judges was becoming more pronounced in Massachusetts, the British Parliament passed the so-called Massachusetts Government Acts, which gave the royal governor the right to transfer cases for trial to other colonies and even to England.

This was more than our forefathers would endure. They agreed not to buy British goods. Washington, the richest man in America, who had always ordered the best of clothes, furniture, carriages, harnesses and supplies from England, directed his London correspondent to send him nothing on which the British Government had laid a tax. It was struggles like these that led the authors of the Declaration to charge against George III—"He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."

The fathers of our nation had learned by bitter experience what executive control of the courts meant. They might well have declared as the Chief Captain said to St. Paul—"With a great sum obtained I this freedom." With the dangers and evils of a controlled judiciary fresh in their minds, they declared in our Constitution that "the judges of both the Supreme and inferior Courts shall hold their Offices during good Behaviour and shall, at stated times, receive for their Services Compensation which shall not be diminished during their Continuance in Office."

With this historic background, it is hard to understand how over fifteen per cent of the lawyers who answered the Questionnaire of the A.B.A. could approve the President's proposal to influence or control the decisions of the Supreme Court by adding to its membership six judges whose views on legislation are in harmony with his own.

Another surprising thing that has come out of the discussions of the last few weeks is that lawyers of foreign birth or origin do not seem to appreciate the value of an independent judiciary. Have they forgotten that even before the rise of the Mussolinis, the Stalins or the Hitlers the courts of many of the Continental states of Europe were, as they are today, sub-

ject to governmental influence and control? Many of these men fail to understand that our Supreme Court is the protector of the liberties of the individual and the rights of minorities.

The other day I asked a very distinguished and learned European exile, formerly a professor in a university in his own country and now on the faculty of one of our own great universities, what he thought of the President's proposal. "Oh," he replied, "I am a foreigner, an alien, I must not speak." He yielded to my persuasions, however, and said that Europeans had little understanding of our Constitution and our Supreme Court; that there should never, never be permitted any interference by the Executive or the legislature with the Supreme Court or any limitation upon its powers insofar as they relate to personal and political rights; although in economic matters amendments might well be needed in view of the vast difference between economic conditions now and 150 years ago.

As to the laity—I wonder. In talking with "plain" people and with people not so plain, I have found it hard to convince them of the importance of an independent judiciary. They are either for or against the President or his policies. They do not seem to know that it is to the Supreme Court that they must look for the protection of individual liberty and the rights of minorities. They are surprised when informed that it was the Supreme Court that reversed the conviction of a teacher in Nebraska for teaching German in a parochial school. (*Meyer v. Nebraska*, 262 U. S. 390, 399-400.) Few of them know of the decision of the Supreme Court holding unconstitutional the Oregon Compulsory Educational Act which required Catholics and Lutherans to take their children out of religious schools and send them to the public schools. (*Pierce v. Society of Sisters*, 268 U. S. 510 535.) Possibly they may know of the unanimous decision of the Supreme Court in January of this year holding the Oregon Syndicalism Law unconstitutional and reversing the sentence of a man to prison for seven years for merely attending a Communistic meeting. (*De Jong v. Oregon*, 81 L. Ed. 189.) The most virulent critics of the Supreme Court in this matter of civil liberties (and, alas, they are lawyers) must know that since the appointment of the present Chief Justice, to go no further back, the Court has stood strongly and consistently for free speech, free press and free assembly.

The discussions of the last few weeks have been of great value as a means of education. It is unfortunate that they range round a piece of so-called emergency or "crisis" legislation, although the proponents of the President's bill fail to state what the crisis is. But the President is in a hurry; something must be done and done quickly; amendments are too slow—they are hard to draw and hard to pass. So with the aid of his docile Attorney General or perhaps of the two young men who Senator Wheeler tells us showed him a similar bill a year ago, he chooses the quick and easy method

of legislation and transmits to Congress his recommendation to reorganize the judicial branch of the Federal Government.

How much wiser it would have been for the President to recommend an amendment fixing an age limit for all Federal judges! The exact age is not important. Senator Burke's amendment (Senate joint Resolution 86) provides for the voluntary retirement of all Federal judges at 70 and compels their retirement at 75. Such an amendment would do all that the President can do by his bill, and do it in an orderly way in accordance with the provisions of the Constitution itself. The whole people would pass on it; not a Congress elected on other issues. At one of the hearings Senator Wheeler stated that there would be little difficulty in bringing the opponents of the President's bill to agree on an amendment which, with the President's powerful backing, could be adopted within a reasonable time. Repeal of the 18th Amendment took only ten months. As most of the States of the Union have age limits for their own judges, their representatives in Congress would doubtless agree on an age limit for Federal judges. But the Burke amendment, if adopted without modification, would retire five justices at one time which would disrupt the Court and its business. Therefore the suggestion made by Dean Smith of Columbia at the same hearing that not more than one or two judges should retire in any one year and in the order of seniority should meet with general approval.

A debate on a Constitutional amendment in the Senate and the House followed, after the adoption of a joint resolution, by popular discussion throughout the whole country in the elections for members of the legislature or delegates to a convention, and later in the legislatures or conventions themselves, would be highly educational. We should be doing with modern instrumentalities what our fathers did by the Federalist.

It seems to me that it is our duty as lawyers to conduct a campaign of education of ourselves and our fellow citizens in the fundamental principles of the American Government. We must dispel false notions and expose fallacies. We must make it plain to the simplest mind that in a democracy the absolute independence of the judiciary is essential; that the Constitution and the laws of the United States made in pursuance thereof is the supreme law of the land; that a written constitution must be interpreted, and that the Supreme Court is of necessity the interpreter of the Constitution; that "an act of the legislature repugnant to the Constitution is void"; that from the beginning of our Government the Supreme Court has interpreted the Constitution, and that the charge now made that a few years ago it assumed or usurped or arrogated to itself for the first time the right to pass on the constitutionality of laws has no foundation whatever.

Twenty-five years ago, when the question of the recall of judges or judicial decisions was before the country, Mr. Root stated, with his incomparable clarity

and power, the whole case for the independence of the judiciary.

"If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but we shall be exhibiting . . . the lack of that self control which enables great bodies of men to abide the slow processes of orderly government rather than to break down the barriers of order when they obstruct the impulse of the moment."

Supreme Court Decisions and Reforms

(From the New York Times.)

"Granted that there are many responsibilities which the Government must accept, many reforms which it must achieve, many humanitarian purposes in which the great mass of the people undoubtedly look to the President for leadership: what decisions of the Supreme Court stand in the way of the Government's power to help provide decent housing, or to protect home owners against foreclosure, or to refinance farm mortgages, or to insure bank deposits, or to provide work for the unemployed, or to proceed against monopolies in business, or to provide protection against floods, or to raise funds for social purposes by imposing high taxes on large incomes, or to control the whole credit structure of the country in the interest of preventing a recurrence of panic and depression?"

Character Examination of Immigrant Attorneys

Continued progress is being made by The National Conference of Bar Examiners in its service for the investigation of the records of immigrant attorneys applying for admission to the bar in one state on the basis of a period of previous practice in another. The Conference has made a total of over three hundred investigations and there are now eighteen states using the service.

The principal source relied on is the opinion of attorneys in the places where the applicant has previously practiced and the bar has been most helpful in responding to queries of this nature. Many enthusiastic letters have been received concerning the service rendered by the Conference. The following is a typical comment:

"I am certainly glad to see that The National Conference of Bar Examiners is undertaking to really find out something in regard to the fitness of lawyers who are making application for practice in one state when they have formerly practiced in another. I have known some unfortunate consequences growing out of the fact of a man leaving one state and going into another where the authorities in charge made no real investigation of the reasons why the gentleman moved from his former abode."

REVIEW OF RECENT SUPREME COURT DECISIONS

New York City Held to Be Performing Governmental Function in Supplying Water to City and Inhabitants, and Salary of Chief Engineer of Water Supply Bureau Is Therefore Exempt from Income Tax—Character of Controversy Which May Be Determined Under Federal Declaratory Judgment Act—Survival of Cause of Action under Merchant Marine Act for Death of Seaman—New Jersey Legislation Affecting Compensation of School Teachers Construed as Not Creating Contractual Right—Lease Covenant to Pay Rent in Gold, Made Prior to Joint Resolution of Congress of June 5, 1933, Held within Operation of Resolution and Dischargeable in Present Currency, etc.

BY EDGAR BRONSON TOLMAN*

Taxation—Immunity of City Employee From Federal Income Tax

In supplying water to meet the needs of the City of New York and of its inhabitants, the City is engaged in the performance of a governmental function, and the salary of the Chief Engineer of the Bureau of Water Supply of the City is immune from the federal income tax.

Brush v. Commissioner of Internal Revenue, 81 Adv. Op. 443; 57 Sup. Ct. Rep. 495.

In this case the Court considered a question as to the immunity from federal taxation of the salary of the Chief Engineer of the Bureau of Water Supply of New York City. The petitioner as Chief Engineer holds office by statutory authority at a fixed annual salary of \$14,000. At an early period water was furnished the City by private companies but more than a century ago the City began to take over the function of supplying water and now performs the entire service with slight exceptions.

The Commissioner of Internal Revenue assessed a deficiency tax against the petitioner in respect of his salary which the Board of Tax Appeals sustained and decreed a deficiency tax of \$256.27 for the year 1931. The Circuit Court of Appeals affirmed the ruling of the Board. On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND with two of the justices specially concurring and two dissenting.

The petitioner's contention was that his salary was immune from federal taxation because he is engaged by the City in the exercise of a governmental function. The opinion of the Court referred to and discusses earlier cases characterizing or qualifying the term "governmental functions" and said:

"The phrase 'governmental functions,' as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina v. United States*, 199 U. S. 437, 461, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a strictly governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172, the immunity from taxation was related to the essential governmental functions of the state. In *Helvering v. Powers*, 293 U. S. 214, 225, we said that the state 'cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing

power would normally extend.' And immunity is not established because the state has the power to engage in the business for what the state conceives to be the public benefit. In *United States v. California*, 297 U. S. 175, 185, the suggested limit of the federal taxing power was in respect of activities in which the states have traditionally engaged."

Reference also was made to the confusion and uncertainty in the law which attempts to differentiate between the governmental and corporate powers of municipal corporations, and particularly in that branch which relates to the tort liability of municipal corporations for the negligence of its employees. However, the view was expressed that the rule in respect of municipal tort liability is not controlling as to the question here presented. As to this, MR. JUSTICE SUTHERLAND said:

"The rule in respect of municipal liability in tort is a local matter; and whether it shall be strict or liberal or denied altogether is for the state which created the municipality alone to decide . . . provided, of course, the federal Constitution be not infringed. But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the States.' . . ."

The solution of the problem here involved was thought to be found by the process of judicial inclusion and exclusion rather than in the formulation and application of a general test. Approaching the problem in this manner the Court emphasized the public interest in the performance of the function of supplying water. As to this the opinion states, in part:

"The public interest in the conservation and distribution of water for a great variety of purposes—ranging from ordinary agricultural, domestic and sanitary uses, to the preservation of health and of life itself—is obvious and well settled. For the modern city, such conservation and distribution of water in sufficient quantity and in a state of purity is as vital as air. And this vital necessity becomes more and more apparent and pressing as cities increase in population and density of population. It has found, so far, its culminating point in the vast and supreme needs of the City of New York."

In this connection reference was also made to the striking illustrations of the public interest in the use of water and with governmental power to deal with it as embraced in legislative and judicial pronounce-

*Assisted by JAMES L. HOMIRE.

ment with respect to the arid lands in the western states. These were referred to as suggesting, although not definitely deciding, that municipal water works created and operated to supply the needs of a city are public works whose operation is essentially governmental in character. After reference to these cases, the conclusion was reached that the activity of the City of New York in supplying water constitutes a governmental function. This conclusion and considerations in support of it was thus stated in the opinion of the Court:

"We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths, could not exist. And this is equivalent, in a very real sense, to saying that the city itself would then disappear. More than one-fourth of the water furnished by the city of New York, we are told by the record, is utilized for these public purposes. Certainly, the maintenance of public schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned, the water supply is a necessary auxiliary, and, therefore, partakes of their nature. . . . Moreover, the health and comfort of the city's population of 7,000,000 souls, and in some degree their very existence, are dependent upon an adequate supply of pure and wholesome water. It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions."

Reference was made to the respondents contention that the sale of water to the inhabitants for profit stamps the function as private in character. This contention, while doubt was expressed as to its soundness in point of fact, was found without merit in any case. As to it the Court said:

"Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized. . . ."

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurred in the result and said:

"We concur in the result upon the ground that the petitioner has brought himself within the terms of the exemption prescribed by Treasury Regulation 74, Article 643, which for the purposes of this case may be accepted as valid, its validity not being challenged by counsel for the Government.

"In the absence of such a challenge no opinion is expressed as to the need for revision of the doctrine of implied immunities declared in earlier decisions.

"We leave that subject open."

MR. JUSTICE ROBERTS delivered a dissenting opinion in which MR. JUSTICE BRANDEIS concurred. In this opinion MR. JUSTICE ROBERTS said, in part:

"It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise; an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetical and remote. Tested by these criteria the imposition of the challenged tax in the instant case was lawful.

"The importance of the case arises out of the fact that the claimed exemption may well extend to millions of persons (whose work nowise differs from that of their fellows in private enterprise) who are employed by municipal subdivisions and districts throughout the nation and that, on the other hand, the powers of the states to tax may be inhibited in the case of hundreds of thousands of similar employes of federal agencies of one sort or another. Such exemptions from taxation ought to be strictly limited. They are essentially unfair. They are unsound because federal or state business ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business.

"We are here concerned only with the question of the taxation of salaries or compensation received by those rendering to a municipality services of the same kind as are rendered to private employers and need not go beyond the precise issue here presented. . . . The sole question here is whether one performing work or rendering service of a type commonly done or rendered in ordinary commercial life for gain is exempt from the normal burden of a tax on that gain for the support of the national government because his compensation is paid by a state agency instead of a private employer. I think the imposition of a tax upon such gain where, as here, the tax falls equally upon all employed in like occupation, and where the supposed burden of the tax upon state government is indirect, remote, and imponderable, is not inconsistent with the principle of immunity inherent in the constitutional relation of state and nation."

The case was argued by Messrs. Boykin C. Wright and Paul Windels for the petitioner, Mr. John Paul Jackson for the respondent, and Julius Henry Cohen as Amicus Curiae.

Federal Declaratory Judgment Act—Jurisdiction—What Constitutes a Controversy

A complaint brought by an insurance company for a decree declaring null and void an insurance policy, on the ground that it had lapsed for non-payment of premiums, which the insured had wrongfully claimed he was relieved from paying, under the policy, by reason of his permanent and total disability, presents a controversy which may be determined under the Federal Declaratory Judgment Act.

Aetna Life Ins. Co. v. Haworth, 81 Adv. Op. 394; 57 Sup. Ct. Rep. 461.

In this opinion the Court ruled on a question as to the jurisdiction of the District Court under the Federal Declaratory Judgment Act. The question arose on the petitioner insurance company's complaint, which was dismissed by the District Court, on the ground that it did not set forth a controversy, and the decree of dismissal was affirmed by the Circuit Court. On certiorari the decree was reversed by the Supreme Court in an opinion by the CHIEF JUSTICE.

The complaint prayed for a decree that four policies of insurance be declared null and void because of

lapse of non-payment of premiums and that insurer's obligation on a fifth policy consist solely of the duty to pay \$45 on the death of the insured. The policies in question were issued to the respondent Haworth, his wife being named as beneficiary. One policy relieves the insured from the payment of further premiums upon proof of disability and entitles him to the sum insured and dividends in 20 annual installments or a life annuity in full settlement. The other four policies provide for a waiver of premiums in case of disability and entitle the insured in one case to a specified monthly allowance and in the other three cases to a continuance of the insurance in force.

Claiming total and permanent disability, the insured stopped paying premiums and asserted claims predicated upon such disability. These claims the insurance company resisted and therefore brought the suit in question for a declaratory judgment praying for the relief above mentioned.

In holding that the District Court had jurisdiction under the Federal Declaratory Judgment Act, CHIEF JUSTICE HUGHES first referred to the constitutional limitation on judicial power to "cases and controversies" and also pointed out that the statute in limiting jurisdiction to "cases of actual controversy" recognized and emphasized the constitutional limitation. Discussion then followed as to the meaning of the term "controversy" in which the Court said:

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

"And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

Attention was then turned to the nature of the controversy here involved in order to determine whether it is a controversy within the meaning of the constitution and the statutory intent. Concluding that the complaint did state a case within the jurisdiction of the District Court, the CHIEF JUSTICE said, in part:

" . . . There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment

of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts. . . .

"Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion."

The case was argued by Mr. E. R. Morrison for the petitioner, and by Mr. Rees Turpin for the respondents.

Merchant Marine Act—Action for Death of Seaman—Survival of Cause of Action

Under the Merchant Marine Act, a cause of action for the death of a seaman, due to the employer's negligence, vested in the decedent's mother as administratrix of the decedent's estate does not abate upon the death of such administratrix.

Van Beeck v. Sabine Towing Co., Inc., 81 Adv. Op. 415; 57 Sup. Ct. Rep. 452.

This case raised for determination the question whether a cause of action for damages, vested by the Merchant Marine Act of 1920 in the personal representative of the seaman, who suffers death in the course of his employment through the employer's negligence, abates on the death of the beneficiary while the suit is pending. Action for the death of one Van Beeck, who lost his life working as a seaman, was brought by his mother. Death occurred as an incident to the sinking of a steam towboat, the *Edgar F. Coney*. Since the deceased had neither wife nor child nor father action was brought by his mother. While the action was pending the mother died and thereupon the petitioner succeeded to her office, became the administrator, and was substituted as a claimant in the pending suit. In the suit a Commissioner found that the mother had suffered loss up to the time of her death in the amount of \$700, and recommended an award of that amount for her estate. The District Court dismissed the claim on the ground that the liability abated upon the death of the mother and the Circuit Court upheld the decision. On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE CARDOZO.

In reaching a decision he reviewed the early history of action for wrongful death, as follows:

"The statutory cause of action to recover damages for death ushered in a new policy and broke with old traditions. Its meaning is likely to be misread if shreds of the discarded policy are treated as still clinging to it and narrowing its scope. The case of *Higgins v. Butcher*, Nov. 18; Yelv. 89, which arose in the King's Bench in 1606, is the starting point of the rule, long accepted in our law, though at times with mutterings of disapproval, that in an action of tort damages are not recoverable by any one for the death of a human being. The rule is often viewed as a derivative of the formula '*actio personalis moritur cum persona*,' a maxim which 'is one of some antiquity,' though 'its origin is obscure and post-classical.' Even in classical times, however, the Roman law enforced the principle that 'no action of an essentially penal character could be commenced after the death of the person responsible for the injury.' Vengeance, though permissible during life, was not to 'reach beyond the grave.' There was also an accepted doctrine that no money value could be put on the life of a freeman. The post-classical maxim, taken up by Coke and his successors, gave a new currency to these teachings of the Digest, and, it seems, a new extension.

But the denial of a cause of action for wrongs producing death has been ascribed to other sources also. The explanation has been found at times in the common law notion that trespass as a civil wrong is drowned in a felony. As to the adequacy of this explanation grave doubt has been expressed. None the less, the rule as to felony merger seems to have coalesced, even if in a confused way, with the rule as to abatement, and the effect of the two in combination was to fasten upon the law a doctrine which it took a series of statutes to dislodge.

"The adoption of Lord Campbell's Act in 1846 (9 & 10 Vict. c. 93), giving an action to the executor for the use of wife, husband, parent or child, marks the dawn of a new era. In this country, statutes substantially the same in tenor followed in quick succession in one state after another, till today there is not a state of the union in which a remedy is lacking. Congress joined in the procession, first with the Employers' Liability Act for railway employees (45 U. S. C. § 51, 59), next with the Merchant Marine Act of 1920 for seamen and their survivors (46 U. S. C. § 688), and again with an act of the same year (March 30, 1920, c. 111, § 1, 2, 41 Stat. 537; 46 U. S. C. § 761, 762), not limited to seamen, which states the legal consequences of death upon the high seas."

In further review of the development of the statutory remedy the opinion points out that the Employers' Liability Act, whose remedial provisions are incorporated by reference into the Merchant Marine Act, embraces a double aspect. In one aspect a new cause of action was created for the benefit of the survivors of designated classes, in which recovery was limited to the losses sustained by them in contrast with losses sustained by the decedent. The other aspect, emerging with the adoption of an amendment of 1910 continues any cause of action belonging to the decedent without diminishing an existing cause of action vested in the survivors. In elaboration of these two phases the opinion states:

"Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. It is loss of this last order, and no other, that is the subject of the present suit. So far as the record shows, the seaman died at once upon the sinking of the vessel. In any event there is no claim that his injuries were not immediately fatal. To what extent the present problem would be altered, if intermediate loss and suffering had been made the basis of recovery, we have no occasion to consider. Our decision must be limited to the necessities of the case before us."

Emphasis was placed upon the fact that the statute creates a new kind of property right in the beneficiaries. The nature of this new property right was analyzed in the following portion of the opinion:

"Viewing the cause of action as one to compensate a mother for the pecuniary loss caused to her by the negligent killing of her son, we think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter, the damages when collected to be paid to her estate. Such is the rule in many of the state courts in which like statutes are in force. . . . When we remember that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary is proved to be impaired. To that extent, if no farther, a new property right or interest, or one analogous thereto, has been brought into being through legislative action. True, there

are decisions under the death statutes of some states that teach a different doctrine, refusing to permit a recovery by the administrator after the beneficiary has died, though the ruling has been made at times with scant discussion of the problem. Indeed, the problem now before us was not always presented to the attention of the court, for at times the death of the beneficiary followed hard upon the death of the person negligently killed or the claim was not urged that there had been damage in the interval. We think the cases favoring survival within the limits already indicated are supported by preponderant authority and also by the better reason. . . ."

"Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day."

The case for the petitioner was argued by Mr. H. C. Hughes and for the respondents by M. A. Grace.

Public Schools—Legislation Affecting Compensation of Teachers

Under legislation in New Jersey, three years of service by a public school teacher does not constitute a contract-status whereby the State is disabled from altering the status or compensation of such teacher.

Phelps v. Board of Education, etc., 81 Adv. Op. 388; 57 Sup. Ct. Rep. 483.

In this opinion the Supreme Court reviewed two cases decided in New Jersey as to the contractual rights of teachers in the public schools. The State Constitution directs the legislature to provide for the maintenance and support of a system of free public schools. In carrying out this direction a school law was adopted in 1903 setting up Boards of Education throughout the State and empowering those Boards to make regulations as to the terms and tenure of employment, salaries and dismissal, and to change and repeal the regulations from time to time. In 1909 the law was amended to provide that the service of teachers, etc., "shall be during good behavior and efficiency," after the expiration of a period of employment of three consecutive years in the district, "unless a shorter period is fixed by the employing board." It further provided that teacher should not be dismissed or subjected to reduced salary except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, after written charges had been made and the charges examined and found true at a hearing on notice to the person affected.

In 1933 a further Act was passed authorizing the Boards in the respective school districts to fix and determine the salaries of employees for the period July 1, 1933, to July 1, 1934, notwithstanding the employee be under tenure. Furthermore it prohibited the increase of salaries during the period named, forbade discrimination within the respective classes and set a minimum salary. Thereupon the appellee Board of Education reduced salaries by a percentage of the existing salaries graded upward in steps as the salaries increased in amounts, except as to clerks whose compensation was reduced to a stated amount. Proceedings were then brought by the appellants contesting the action of the Board, but the appropriate administrative agencies and

the Courts of New Jersey sustained the action of the Board. On certiorari this was affirmed by the Supreme Court in an opinion by Mr. JUSTICE ROBERTS. In concluding that the statutory provisions and three years of service under the Act did not constitute a contract disabling the legislature from changing the status of public school teachers Mr. JUSTICE ROBERTS said:

"The position of the appellants is that by virtue of the Act of 1909 three years of service under contract confer upon an employe of a school district a contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter. The Supreme Court holds that the Act of 1909 'established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. . . . The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change.'

"This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not become a term of the contracts entered into with employes by boards of education. Unless these views are palpably erroneous we should accept them.

"It appears from a stipulation of facts submitted in lieu of evidence that after a teacher has served in a school district under yearly contracts for three years it has not been customary to enter into further formal contracts with such teacher. From time to time, however, promotions were granted and salary raised for the ensuing year by action of the board. In the case of many of the appellants there have been several such increases in salary.

"Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year. The employe assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the board, a creature of state, from reducing the teacher's salary or discharging him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher."

A further contention to the effect that the Board's action constituted arbitrary discrimination was also considered, but was found to be without merit.

The case was argued by Mr. Robert H. McCarter for the Appellant, and by Mr. Saul Nemser for the Appellee.

Gold Resolution—Effect on Rental Payments Under Leases

Under the Joint Resolution of Congress of June 5, 1933, and related legislation, a lease covenant, made prior to the adoption of the Resolution, to pay rent in a quantity of gold equal to a stated number of gold dollars of the then existing weight and fineness, or the equivalent thereof in currency, is within the operation of the Resolution, and the obligation is dischargeable, dollar for dollar, in present currency.

Holyoke Water Power Co. v. American Writing Paper Co.—81 Adv. Op. 383; 57 Sup. Ct. Rep. 485.

In this case the Court considered a question as to the effect of the Joint Resolution of June 5, 1933, and related legislation respecting the gold clause in private

contracts. The petitioner, Holyoke Water Power Company, had executed some thirteen leases to the Respondent, American Writing Paper Company, between 1881 and 1897 containing provisions for the payment of rental. A typical provision provides that the grantee shall pay the grantor "a quantity of gold which shall be equal in amount to fifteen hundred (\$1500) dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency." Since the gold content of the dollar has been reduced, the lessor contended that payment should be made on the basis of ounces of gold as contained in the stipulated dollars at the time of execution of the leases. The District Court and the Circuit Court of Appeals ruled against the contention and in favor of the lessee, which urged that the obligation was dischargeable, dollar for dollar, in the currency prevailing after devaluation of the dollar. On certiorari this ruling was affirmed by the Supreme Court in an opinion by Mr. JUSTICE CARDOZO with four of the Justices dissenting.

In the prevailing opinion the lessor's contention was thus explained:

"... the lessor did not deny that the law declines to give effect to contracts whereby debts are made payable in gold coin, or in currency varying in amount with the gold basis of the dollar. . . . What was argued was rather this, that the covenant here in question was not for the payment of a debt, but for the sale of a commodity, or if viewed as a covenant for payment, that the standard was the commodity value of the bullion, not the value of the coin as money, the difference being thought to be sufficient to change the applicable rule."

In reaching its conclusion the Court considered the nature of the obligation and found that it was one for the payment of money and not for the delivery of gold as upon the sale of a commodity. As to this aspect of the case the opinion states:

"By the first term of the alternative, there may be payment of the rent in the form of 'a quantity of gold which shall be equal in amount to \$1500 of the gold coin of the United States of the standard of weight and fineness of the year 1894.' In this form there is no call for a stated number of ounces of fine gold, as if a goldsmith were providing for the uses of his business. The call is for gold that shall be as heavy and as fine as a stated number of gold dollars, with the result that delivery in such dollars is a payment in strict accordance with the letter of the contract. We must consider the situation of the parties, their business needs and expectations, in gauging their intention. When these are kept in view, the gold is seen to be a standard with which to stabilize the value of the dollar; the dollar not a yardstick with which to measure the quantity of the gold. To read the leases otherwise is to permit the realities of the transaction, its substance and essential purpose, to be obscured by forms and phrases."

The alternative to pay the equivalent of gold "in United States currency" was emphasized as a further indication that the intent was to provide for the payment of money rather than for the delivery of a commodity.

Attention was then given to the question whether the Joint Resolution abrogated an obligation to pay in currency provided only that the currency was equal to the value of the gold. In this connection reference was made to the history of the Joint Resolution as set forth in *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240. The purpose of that Resolution in relation to the instant case was then stated as follows:

"... The Resolution touches gold as well as coin or currency whenever transactions in either are within the evil to be remedied. We learn from the preamble that

'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts.' Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute. Cf. Executive Order of April 5, 1933, and August 28, 1933; Orders of the Secretary of the Treasury, December 28, 1933 and January 15, 1934; Emergency Banking Act of March 9, 1933, 48 Stat. 1, 2, sec. 3. An obligation to make delivery upon a *bona fide* sale is not fairly to be classified as an obligation 'payable in money' (Joint Resolution, subdivision (b)), or so we now assume. But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered in satisfaction of a debt expressed in terms of dollars, payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions whereby a debt is to be discharged, not in bullion, but in dollars, if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit."

The opinion was concluded with the following summary of the petitioner's case:

"... In the last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollars fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, is the effect, and the covenant of the parties is to that extent abortive. But the disappointment of expectations and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. 'Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. . . . To that congenital infirmity this covenant succumbs.'"

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER, dissented.

The case was argued by Mr. Bentley W. Warren for the petitioner, and by Mr. Charles P. Curtis, Jr. for the respondent.

Taxation—State Income Tax on Rents From Land in Another State

The Fourteenth Amendment does not prohibit a state from imposing on a resident an income tax in respect of income in the form of rents derived from land in another state, or interest on bonds located in another state and secured by land situated in the other state.

New York ex rel Cohn v. Graves et al., 81 Adv. Op. 409; 57 Sup. Ct. Rep. 466.

In this opinion the Court ruled on a question as to whether a state may constitutionally tax a resident upon income received from rents of land located outside the state and from interest on bonds physically outside the state and secured by mortgage on lands similarly located. The case arose in proceedings brought by the appellant to review a determination of

the New York Tax Commission refusing her application for a refund of state income taxes for certain years so far as taxes were attributable to rents received by her from New Jersey land, and interest on bonds secured by mortgage on New Jersey real estate, the bonds and mortgages being physically in New Jersey. The appellant contended that the tax was in substance an imposition on real estate and tangible property outside the state, in violation of the Fourteenth Amendment. The state courts upheld the tax and upon appeal their ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE, with MR. JUSTICE BUTLER and MR. JUSTICE McREYNOLDS dissenting.

Recognizing that New York may not levy a tax upon the appellant's interest in the property, attention was turned to the question whether the Fourteenth Amendment prevents the taxation of income merely because it is derived from sources outside the state. In this connection, it was pointed out that the receipt of income by a resident of the territory of a taxing sovereignty as a taxable event is universally recognized, and that neither the privilege nor the burden is affected by the character of the source from which the income is derived.

In elaboration of this latter point the opinion states: "Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power. . . . It may tax net income from bonds held in trust and administered in another state, although the taxpayer's equitable interest may not be subjected to the tax. . . . It may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden. . . . Congress may lay a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision. . . ."

"Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicted upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.

"It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. . . . These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicile, irrespective of the location of the land, and that the state court rightly upheld the tax."

The same reasoning was considered decisive of

the contention that the income from the bonds was not taxable because secured by mortgages on land outside the state.

In addition the appellant argued that the interest from the bonds was immune because they had acquired a business situs in New Jersey. So far as this contention was concerned it was found not to be supported by the record.

A further contention made by the appellant based on the retroactive nature of the tax was rejected, because not properly raised in the state courts.

MR. JUSTICE BUTLER expressed his dissent in the following opinion:

"The tax is on income. I am of opinion that the rents received by appellant for the use of real estate in New Jersey may not be included in her taxable income. By our decision it is established that a tax on income received for the use of land is in legal effect a tax upon the land itself. . . .

"New Jersey, in addition to tax on the land measured by its value, may lay a tax upon the income received by the owner for its use. . . .

"Appellant's right to own, or to collect rents in New Jersey for the use of, lands in that State was not given and is not protected by New York law. Neither of these rights is enjoyed in New York or has any relation to appellant's privilege of residence in, or to the protection of, that State. Ability of taxpayers to pay may be taken into account for apportionment of the tax burdens that it is authorized to impose. But the financial means of those to be taxed cannot be made to generate for the State power to tax lands, or rents paid for use of lands, beyond its borders. I would exclude the item."

Mr. Justice McReynolds concurred in the dissenting opinion.

The case was argued by Mr. Maurice Cohn for the appellant, and by Mr. Joseph M. Mesnig for the appellees.

Taxation—Documentary Stamp Tax on Transfers to Nominees

In a case where the person entitled to receive shares of stock has the certificates transferred to a nominee, the federal documentary stamp tax is applicable to the transfer of the stock certificates to the nominee, notwithstanding that the nominee receives no beneficial interest by reason of such transfer.

Founders General Corporation v. Hoey et al., 81 Adv. Op. 435; 57 Sup. Ct. Rep. 457.

In this opinion three cases were considered by the Court in an opinion by MR. JUSTICE BRANDEIS. While the facts in the three cases varied, they presented, in the main, the same question which was stated as follows:

" . . . When, at the instance of one entitled to receive stock, the certificates therefor are, at his request and for his convenience, issued by the corporation in the name of a nominee who receives no beneficial interest therein, does the transaction involve a transfer by the beneficial owner requiring a documentary stamp pursuant to Section 800, Schedule A-3, of the Revenue Act of 1926, February 26, 1926, c. 27, Title VIII, 44 Stat. 99, 101?"

The applicable part of Section 800, Schedule A—Stamp Taxes, reads:

"3. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or

agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each \$100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts. . . ."

The principal contention passed on in the opinion was that the tax was not applicable for the reason that in none of the cases did the transaction involve the transfer of a beneficial interest. That fact, however, was deemed to be without legal significance in view of the terms of the taxing act. In rejecting the contention MR. JUSTICE BRANDEIS said:

" . . . The tax is exacted because the taxpayer transferred 'the right to receive' the certificate. Likewise it is without legal significance that, under power of attorney from nominee to beneficial owner, the former may have no part in the management or disposal of the securities. Nor is it material that in no case did the nominee have a right, at least as against the taxpayer, to compel issuance of the stock to himself. The legal title to the shares was received by the nominee from the newly formed corporation; but the authorization rendering his holding lawful was received from the taxpayer. The legality of the issuance of the stock in the names of the nominees rests on the fact that the taxpayers authorized such issuance and granted their nominees the right to receive the stocks entered in their names. The grant of that authority is a transfer of 'the right to receive' within the meaning of the Act; and we are not to look beyond the Act for further criteria of taxability. . . .

"The statute defines the scope of the tax in terms whose breadth is emphasized by the careful particularity of its provisos. Especially indicative of Congressional intention that nominee transactions generally should be subject to the tax are the provisos added by the Revenue Act of 1932, June 6, 1932, c. 209, § 732, 47 Stat. 273, and the Act of June 29, 1936, c. 865, 49 Stat. 2029, which except certain specifically described transfers to nominees."

The case was argued by Mr. Royal E. T. Riggs for Petitioner in No. 39, Mr. J. P. Jackson for Petitioner in Nos. 330 and 331; by Mr. J. P. Jackson for Respondent in No. 398, Mr. Jesse I. Miller for Respondent in No. 330, and by Mr. George K. Bowden for Respondent in No. 331.

State Statutes—California Caravan Act—Undue Burden on Interstate Commerce

The California Caravan Act, imposing a fee of \$15 for each motor vehicle brought into the state for the purpose of sale, constitutes an undue burden on interstate commerce, and is invalid under the commerce clause of the federal Constitution. The fee exacted is excessive for the declared purposes of the Act of meeting the expense of administering the Caravan Act and of providing policing of caravanning over the highways.

Ingels et al. v. Morf et al., 81 Adv. Op. 406; 57 Sup. Ct. Rep. 439.

In this opinion the Court sustained the decree of the District Court for Southern California restraining the enforcement of the California Caravan Act. That Act defines "caravanning" as transportation, from with-

out the state, of any motor vehicle on its own wheels, or in tow, for the purposes of sale or offering for sale. Caravaning is prohibited without a permit for each vehicle; and a fee of \$15 is charged for each permit. The permit is good only for the trip or trips specified in it, and is good for only 90 days.

The fees are placed in the general fund of the state treasury, for the added expense of administering the law and policing the highways.

In holding the imposition to be an undue burden on interstate commerce, the Court, in an opinion by MR. JUSTICE STONE, distinguished the case from *Morf v. Bingaman*, 298 U. S. 407, which sustained the Caravaning Act of New Mexico, containing some similar features. There the fees were \$7.50 each for vehicles moving under their own power, and \$5.00 for each vehicle towed, (the fees being devoted, in part, to highway purposes), and were held to be a reasonable charge for highway use. The New Mexico Act, consequently, met the constitutional requirements. These requirements were thus expressed in the opinion:

"To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. . . . This may appear for the statute itself, . . . or from the use of the money collected, to defray such expense.

These requirements, however, were not satisfied by the California Act. As to that statute, and its failure to meet the applicable test, the learned Justice said:

"Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of its highways. Section 6 of the challenged act, which directs that the permit fees be paid into the general fund of the state treasury, is to be contrasted with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part, into special funds devoted to highway purposes. . . . Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes, and the Street and Highways Code, § 183, Cal. Stat. 1935, c. 29, provides: 'With the exception of money authorized by law to be deposited in the state highway general fund, all money available for the acquisition of real property or interest therein for state highways or for construction, maintenance or improvement of state highways, or highways in state parks, shall be deposited in the state highway fund.'

"Hence we must look to the statute itself to ascertain the purposes for which the permit fees are collected. On this point it is explicit. It declares (§ 6) that they are intended to reimburse the state treasury for the added expense of administering the Caravan Act and policing the caravaning traffic. This negatives any inference of the purpose of the collection which might otherwise be drawn from the statute, and from its provision that the permit is prerequisite to the use of the highways . . . it is true that this declaration is not an appropriation of the moneys collected and it does not foreclose the use of the fund for highway maintenance, should the state elect to do so. But until such appropriation is made the statute itself states the legislative purpose, and precludes state officials from asserting that the fees are collected for any other."

The Court recognized that the burden rested on the appellee to show that the fee exacted was excessive for the declared purpose of administering the Act and policing the highways. Review of the findings of the lower court and of the evidence on which it relied led to the conclusion that such burden had been sustained by the appellee.

The case was argued by Messrs. Frank W. Richards and Amos M. Mathews for the appellants, and by

Messrs. Ralph K. Pierson and Byron J. Walters for the appellees.

NOTES OF ALL OTHER CASES DECIDED BY OPINION, MARCH 1 to 15, 1937

No. 295—*Powell, Jr., et al receivers of Seaboard Air Line Railway Co. vs. United States et al*, 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Appeal from a decree of a statutory three judge district court which affirmed an order of the Interstate Commerce Commission and granted injunctive relief against appellants. In an opinion by Mr. Justice Butler the Court held that the Commission's order striking the schedule of tariffs filed by the appellant because it covered stations not on the carriers line in violation of § 6(1) of the Interstate Commerce Act, was in effect an affirmative order reviewable by the statutory court; but that, since the record conclusively showed that the order actually was not based on a violation of § 6 alone, but in effect enjoined appellant from extending its services because contrary to § 1(18) of the Act; and since the enforcement of § 1(18) can be secured under the Act only by suit in a three judge court to set aside an order granting a certificate of public interest or by an original suit under § 1(20) of the Act in the district court to enjoin violation; therefore the Commission's order in this case was not within its authority and the statutory district court committed error in affirming it. The opinion further held that the injunctive relief granted on the counterclaim asserted by the intervening defendant based on allegations appropriate to a complaint under § 1(20) to prevent violation of § 1(18) was not within the jurisdiction of the three judge court, under the Act; was not authorized by Equity Rule 30; and that, therefore, the counterclaim should have been stricken.

MR. JUSTICE CARDOZO agreed that the counterclaim should be stricken but stated that the decree should be affirmed after being so modified.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE took no part in the case.

No. 398, No. 331, No. 330—*Founders General Corporation vs. James J. Hoey, Collector; United States vs. A. B. Leach & Co., Inc.; United States vs. Automatic Washer Company*, 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Certiorari to review conflicting judgments of circuit courts of appeals and one of the court of claims, all involving suits for refund of Federal documentary stamp taxes. Resolving the conflict, the Court held, in an opinion by MR. JUSTICE BRANDEIS, that when at the instance of one entitled to receive stock, the certificates are, at his request and for his convenience, issued by the corporation in the name of a nominee who receives no beneficial interest therein, the transaction nevertheless involves a transfer by the beneficial owner requiring him to pay a documentary stamp tax under § 800, schedule A-3 of the Revenue Act of 1926.

No. 406—*Sumi vs. Young*, 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Certiorari to review dismissal by the circuit court of an appeal from the District Court for Alaska which reviewed *de novo* a contest over the appointment of guardian for two minor children by the probate court of Fairbanks. The Court, in an opinion by MR. JUSTICE McREYNOLDS, held that the appeal was properly dismissed, since it is not within the scope of § 128(a) "third" of the Judicial Code regulating appeals to the circuit court from the district court for Alaska and since the Act of June 6, 1900, ch. 786, 31 Stat. 480, relating to appeals in probate cases in Alaska is not applicable to enlarge the appellate jurisdiction conferred on the Circuit Court by the provision of the Judicial Code. MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurred in the result.

No. 454 and No. 455—*Phelps vs. Board of Education of the Town of West New York et al; Askam et al vs.*

Same. 81 Adv. Op. —; 57 Sup. Ct. Rep.—. Decided March 1, 1937.

Appeal from the New Jersey Court of Errors and Appeals, to review a judgment involving the constitutionality of State Education Commission orders reducing public school teacher's salaries, under ch. 12 of the New Jersey laws of 1933 which authorized such reductions. The Court, in an opinion by MR. JUSTICE ROBERTS held that the New Jersey school law as amended by § 1 of the Act of April 21, 1909, creating a legislative status for teachers after three years' service, does not create a legislative contract that can not, under the contract clause of the Federal Constitution, be modified by the legislature. The system of reduction used in this instance whereby teachers were grouped in several classes according to the amount of salary received, and differing percentages of reduction were applied to each group, was not so arbitrary or unreasonable as to violate the Fourteenth Amendment.

No. 456—*Ingels, as Director of the Motor Vehicle Department of California, et al vs. Morf, et al.* 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Appeal from a decree of a three judge court of California restraining the State official from enforcing the "Caravan" Act (Cal. Stat. 1935, c. 402). In an opinion by MR. JUSTICE STONE, the Court held that the licensing provisions of the Act, imposing a fee of \$15.00 for each motor vehicle transported on the State highways from without the State for the purpose of offering it for sale to purchasers within or without the State and declaring that the receipts so collected are intended to reimburse the State Treasury for the expense of administering the Act and policing the caravaning traffic, were in the light of the evidence of actual cost presented in the district court excessive and, therefore, imposed an unconstitutional burden on Interstate Commerce.

No. 460—*VanBeeck, Administrator vs. Sabine Towing Company, Inc., et al.* 81 Adv. Op. —; 57 Sup. Ct. Rep.—. Decided March 1, 1937.

Certiorari to review District Court judgment dismissing administrator's claim for damages arising under § 33 of the Merchant Marine Act of 1920. In an opinion by MR. JUSTICE CARDOZO the Court held that the cause of action for damages given by the Act to the personal representative of a seaman who has suffered death in the course of his employment by reason of his employers negligence does not abate where the beneficiary dies during the pendency of a suit in her behalf.

No. 494—*Swayne and Hoyt, Ltd., et al vs. United States.* 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Appeal from three judge District Court (D. C.) decree sustaining an order of the Secretary of Commerce which cancelled, as unduly prejudicial, a contract rate schedule filed with him by members of the Gulf Inter-coastal Conference under the Shipping Acts. The Court, in an opinion by MR. JUSTICE STONE, held that the exercise by the Secretary, in making this order, of powers originally conferred by Congress upon the Shipping Board had been validly ratified by subsequent retroactive legislation and that since there was evidence before the Secretary to support his finding that the contract rate schedule discriminated unreasonably against non-contract shippers, it was valid under §§ 15, 16, 17 and 18 of the Shipping Act of 1916. MR. JUSTICE SUTHERLAND dissented.

No. 549—*Lawrence, guardian of Newsome, incompetent, vs. Shaw, et al.* 81 Adv. Op. —; 57 Sup. Ct. Rep.—. Decided March 1, 1937.

Certiorari to review decision of Supreme Court of South Carolina involving immunity from local taxation under the Federal statutes of bank deposits of a World War Veteran. In an opinion by MR. CHIEF JUSTICE HUGHES, the Court held that under § 22 of the World War Veterans Act of 1924 as clarified by the Act of August 12, 1935, §§ 3 and 5, the bank credits of a veteran or his guardian which do not represent or flow from

his investments, but result from the deposit of warrants or checks received from the United States Veterans Bureau in payment of adjusted compensation or insurance, when deposited in the ordinary manner so that they are subject to draft upon demand for the veteran's use, are immune from taxation by county and municipal authorities.

No. 563—*Hoffman, Receiver, etc. vs. Rauch, etc.* 81 Adv. Op. —; 57 Sup. Ct. Rep. —. Decided March 1, 1937.

Certiorari to review circuit court holding involving allowance of preference status to a creditor of an insolvent National Bank. In an opinion by MR. JUSTICE McREYNOLDS, the Court held that when a National Bank sells, without the owner's consent, a security held by it for safekeeping, charging the purchase price to its deposit account, and the bank is subsequently declared insolvent, and placed in the hands of receivers, the owner of the security is not entitled to participate in the distribution of the assets as a preferred creditor although he shares as a general creditor.

SUMMARY OF OTHER BUSINESS OF SUPREME COURT

March 1 to March 15, 1937

[The order of business at the beginning of a session of the Court is as follows:

- 1st. Reading of opinions in cases ready for decision,
- 2nd. Announcing orders in other cases,
- 3rd. Entertaining motions for admission to the Bar, and other motions which may be presented,
- 4th. The day call of cases is read by the Chief Justice and argument begun on the first one listed.]

Oral arguments presented during the two-week session which began Monday, March 1, 1937, and ended Monday, March 15, 1937, included the following cases:

- 103 *District of Columbia v. Clawans*—reargued March 1, 1937, by Mr. Raymond Sparks for petitioner and Mr. Seth Richardson for respondent.
- 227 *Matos v. Hermanos, et al.*—argued March 2, 1937, by Mr. Nelson Gammans for petitioner and Mr. Francis H. Dexter for respondents.
- 418 *Henneford, et al. v. Silas Mason Company, Inc., et al.*—reargued March 1 and March 2, 1937, by Mr. R. G. Sharpe for appellants and Mr. B. H. Kizer for appellees.
- 491 *City of Holton v. Kansas State Bank, et al.*—argued March 2, 1937, by Mr. Albert M. Cole for appellant.
500. *Martin v. National Surety Company, et al.*—argued March 2 and March 3, 1937, by Mr. Richard S. Bull for petitioner and Mr. J. H. Cunningham, Jr., for respondents.
- 505 *The Atchison, Topeka and Santa Fe Railway Company v. Scarlett*—argued March 3, 1937, by Mr. H. K. Lockwood and Mr. Robert Brennan for petitioner and Mr. Louis E. Goodman for respondent.
- 530 *Wight v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al.*—argued March 3 and March 4, 1937, by Mr. William Lemke, Mr. S. S. Lambeth, Jr., and Mr. Elmer McClain for petitioner and Mr. T. X. Parsons and Mr. John Strickler for respondents.
- 531 *Boseman v. Connecticut General Life Insurance Company*—argued March 4 and March 5, 1937, by Mr. Leon P. Howell for petitioner and Mr. William Marshall Bullitt and Mr. Major T. Bell for respondent.
- 532 *United States v. Belmont, et al. as Executors of August Belmont, Deceased*—argued March 4, 1937, by Mr. Solicitor General and Reed and Mr. David E. Hudson for petitioner and Mr. C. W. Wickersham for respondents.
- 534 *Bourjois, Inc. v. Clyde R. Chapman, et al.*—argued March 5, 1937, by Mr. Asher Blum for appellant and Mr. Ralph W. Farris for appellees.
- 552 *Kelly, as Director of the Department of Labor and Industries of Washington, et al. v. State of Washington, on the Relation of Foss Company, Inc., et al.*—

- argued March 9, 1937, by Mr. W. A. Toner and Mr. Daniel Baker for petitioners and Mr. Glenn J. Fairbrook for respondents.
- 558 *Alaska Packers Association v. Pillsbury, as Deputy Commissioner under the Longshoremen's and Harbor Workers' Act and Frank Weidemann*—argued March 9, 1937, by Mr. Eugene M. Prince for petitioner and Mr. J. Frank Staley for respondents.
- 559 *General Baking Company v. Harr, Secretary of Banking for Pennsylvania, etc., et al.*—argued March 5, 1937, by Mr. George Eugene Beechwood for petitioner and Mr. Joseph S. Clark, Jr., for respondents.
- 562 *United States v. Madigan*—argued March 10, 1937, by Mr. Wilbur C. Pickett for petitioner and Mr. Jordan R. Bentley for respondent.
- 570 *Southern Natural Gas Corporation, et al. v. Alabama*—argued March 10, 1937, by Mr. Forney Johnston and Mr. Joseph F. Johnston for appellants and Mr. Frontis H. Moore for appellee.
- 573 *Highland Farms Dairy, Inc. et al. v. Agnew, Chairman, et al. as Members of the Milk Commission of Virginia*—argued March 8 and March 9, 1937, by Mr. Philip Rosenfeld and Mr. Lawrence Koenigsberger for appellants and Mr. Edwin H. Gibson and Mr. John S. Barbour for appellees.
- 575 *Brown, Jr., v. O'Keefe, Receiver*—argued March 8, 1937, by Mr. William Elmer Brown, Jr., for petitioner and Mr. George P. Barse for respondent.
- 588 *Oppenheimer v. The Harriman National Bank & Trust Company, et al. and The Harriman National Bank & Trust Company, et al. v. Oppenheimer*—argued March 11 and March 12, 1937, by Mr. Edward S. Greenbaum for Oppenheimer and Mr. Martin Conboy for The Harriman National Bank & Trust Company.
- 599 *Stroehmann and Lycoming Trust Company, Trustee v. Mutual Life Insurance Company*—argued March 11, 1937, by Mr. George H. Hafer for petitioners and Mr. William Marshall Bullitt for respondent.
- 600 *United States v. Norris*—argued March 11, 1937, by Mr. Charles E. Wyzanski, Jr. for petitioner and Mr. William E. Shuman for respondent.
- 602 *Welch, Former Collector v. Obispo Oil Co.*—argued March 10 and March 11, 1937, by Mr. J. Louis Monarch for petitioner and Mr. Joseph D. Peeler for respondent.
- 605 *American Propeller and Manufacturing Company v. United States*—argued March 12, 1937, by Mr. J. Kemp Bartlett and Mr. Edgar Allen Poe for petitioner and Mr. J. Louis Monarch for respondent.
- 614 *Sonzinsky v. United States*—argued March 12, 1937, by Mr. Harold J. Bandy for petitioner and Mr. Brian McMahon for respondent.
- No. —Original. *Texas v. New York, et al.*—argued March 8, 1937, by Mr. William McCraw and Mr. Llewellyn B. Duke for complainants and Mr. James J. Ronan and Mr. H. E. Carter for the defendants.
- During this two weeks' session, orders were announced noting probable jurisdiction in 5 cases on appeal. In 2 cases the question of jurisdiction of the court on appeal was postponed to the hearing on the merits. Petitions for certiorari were granted in 8 cases and denied in 59. Petitions for rehearing were denied in 12 cases.
- In the following cases, the appeals were dismissed with *per curiam* memoranda:
- 491 *City of Holton v. Kansas State Bank, et al.*—March 8, 1937.
- 622 *New York Life Insurance Company, et al. v. Alexander, Executor, etc.*—March 1, 1937.
- 692 *Bunger v. Town of Green River, Wyoming*—March 1, 1937.
- 693 *Vaughan, et al. Co-Partners, etc. v. New York*—March 1, 1937.
- 698 *Peter H. Markmann Funeral Home, Inc. v. Ryan*—March 1, 1937.
- 742 *People of the State of Illinois, ex rel. De Bardas, etc. v. Toman, Sheriff*—March 15, 1937.
- 758 *Singer v. Illinois, ex rel. Rusch*—March 15, 1937.
- In No. 854, *City Bus Company v. Mississippi*, the appeal was reinstated and then dismissed with a *per curiam* memorandum—March 1, 1937.
- Reviews were allowed on appeal or on certiorari in the following cases and they will come on for hearing at a later date:
- On Appeal
- 690 *Dugan and Creeden, Co-Partners, etc. v. Bridges, Governor of New Hampshire, et al.*
- 712 *Phillips Pipe Line Company v. Missouri.*
- 713 *Dodge, et al. v. Board of Education of the City of Chicago, et al.*
- 724 *Carmichael, Individually and as Attorney General of Alabama, et al. v. Southern Coal & Coke Company.*
- 731 *National Fertilizer Association, Inc., et al. v. Bradley, Individually and as Chairman of Board of Trustees of Clemson Agricultural College, et al.*
- 734 *United States and Interstate Commerce Commission v. American Sheet & Tin Plate Company, et al.*
- 797 *Carmichael, Attorney General of the State of Alabama, et al. v. Gulf States Paper Corporation.*
- On Certiorari
- 202 (October Term, 1935) *Stone, et al. v. White, Former Collector, etc.*
- 285 *United States, Ex Relatone, Girard Trust Company, Trustee, etc. v. Helvering, Commissioner.*
- 621 *First National Bank & Trust Company of Bridgeport, Connecticut, Trustee v. Beach.*
- 688 *Shulman, et al. v. Wilson-Sheridan Hotel Company, et al.*
- 703 *Old Colony Trust Company, Trustee, v. Commissioner of Internal Revenue.*
- 716 *Great Lakes Transit Corporation v. Interstate Steamship Company, et al.*
- 721 *Lipson v. Socony Vacuum Corporation.*
- 722 *Lipson v. Standard Oil Company of New York, Inc.*
- In No. 741, *Blackman, et al. v. Stone, Individually and as Chairman of State Officers Electoral Board of the State of Illinois, et al.*, the decree of the three-judge district court under 28 U.S.C. 380 was vacated on the ground that the cause, so far as injunctive relief was sought, had become moot but without prejudice to action by the district court in relation to any matter remaining in the cause. Memorandum opinion *per curiam*, March 8, 1937.
- In No. 8, original, *Kentucky v. Indiana*. Report No. 14 for defendant (Indiana) was presented on March 8th and received and ordered filed on March 15th.
- In No. — original, *Texas v. New York, et al.*, motion for leave to file a bill of complaint was denied without prejudice, March 8th, and in No. — original, *Texas v. Florida, et al.*, the motion for leave to file complaint was granted and process ordered to issue, returnable May 17, 1937.
- The Court ordered a recess from Monday, March 15, 1937, to Monday, March 29, 1937.
- Note: The Supreme Court handed down seventeen opinions Monday, every Justice presenting one or more opinions. The Washington statute providing minimum wages for women was upheld, five to four; the Adkins case being reconsidered and overruled. The Virginia Milk and Cream Act, establishing a commission with power to fix minimum and maximum prices, was sustained, five to four. The Railway Labor Act, as amended in 1934, was sustained without dissent. These and other important cases will be reviewed in the next issue of the JOURNAL.

INTENTIONAL HARMS AND NEGLIGENCE SINCE THE RESTATEMENT OF TORTS

An Attempt to Note Some of the Significant and Interesting Developments in the Field of Law Covered by the First Two Volumes of the Torts Restatement—Mental Suffering without Bodily Harm—Same Caused by Negligence Toward a Third Party—False Imprisonment—Liability of Dealers in Food Stuff—Of Manufacturers—Condition and Use of Land—Legal Cause and Damage

BY HON. OLIVER W. BRANCH
Justice of the Supreme Court of New Hampshire

THE title of this article indicates its limitations. An attempt has been made to note some of the significant and interesting developments in the fields of law covered by the first two volumes of the American Law Institute's Restatement of Torts. No attempt has been made to survey the whole field of Torts or to digest all the cases which have been decided since the Restatement was published in 1934. It has been necessary to choose selected topics for consideration.¹ To some the choice may appear arbitrary. Personal interest has no doubt influenced it, and responsibility for it rests solely with the writer.

MENTAL SUFFERING WITHOUT BODILY HARM

Persistent and occasionally successful efforts continue to be made to expand the limits of liability for acts which cause mental or emotional suffering unaccompanied by physical harm. A careful study of these cases has been made by Professor Magruder of the Harvard Law School,² who concludes that the law upon this subject is in process of growth and that the development of new principles may be expected.

The case of *LaSalle Extension University v. Fogarty* (1934)³ is typical of a class of cases in which recovery for purely emotional disturbance was allowed. That case was a suit upon a promissory note in which the defendant set up a counterclaim for damages on account of mental suffering due to the methods used by the plaintiff in seeking to collect the note. It appeared that over a period of two years the plaintiff had sent to the defendant thirty-seven letters of a threatening and abusive character and had also written to the defendant's employer and two of his neighbors. An award of \$500 to the defendant on his counterclaim was sustained on appeal.

Several other decisions allowing recovery under similar circumstances are collected by Professor Magruder in the article above referred to, from which he deduces the following conclusion:

"That debtors ought to be protected from being

bedeviled and harassed by offensive, high-pressure, extra-legal methods of collection is a sentiment definitely crystallizing in these cases."⁴

In reaching its conclusion the Nebraska court quoted and approved the following statement from *Barnett v. Collection Service Company*:⁵ "The rule seems to be well established where the act is wilful or malicious as distinguished from being merely negligent, that recovery may be had for mental pain though no physical injury results." This statement can be accepted as sound only if it is assumed that the word "act" was intended to convey the idea of a legal wrong. Usually the mere infliction of mental distress is not regarded as a legal wrong. As a general rule "the interest in freedom from mental or emotional disturbance is not protected even against the most malevolent and intentional invasions,"⁶ and a *fortiori* it is not protected against negligent invasions.⁷

Upon this ground a different result was reached in the case of *Atkinson v. Bibb Manufacturing Company* (1935).⁸ In that case the defendant's foreman used profane and humiliating language in addressing the plaintiff before other employees. The plaintiff sought to recover damages for mental suffering thus occasioned. In ordering judgment for the defendant, the court said: "Mental pain and anguish to be the basis of a recovery of damages, must be the consequences of a violation of a legal right or duty which is an actionable wrong. . . . The civil law does not undertake to redress psychological injuries unsupported by actual or nominal damages."

4. Magruder, op. cit. 1063.

5. 24 Ia. 1303, 242 N. W. 25 (1932).

6. Restatement, Torts §306, comment b. The rule of non-liability is formally stated in Section 46, as follows:

"§46. CONDUCT INTENDED TO CAUSE EMOTIONAL DISTRESS ONLY.

Except as stated in §§ 21 to 34 [assaults] and §48, [liability of common carriers], conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability

(a) for emotional distress resulting therefrom, or

(b) for bodily harm unexpectedly resulting from such disturbance."

7. cf. *Klumbach v. Silver Mt. Cemetery* (1934) 275 N.Y.S. 180, affd (1935) 268 N. Y. 525. There the defendant lost the body of a still-born child which had been intrusted to it for burial, and the father was allowed to recover for purely mental suffering. There is nothing in the brief memorandum opinion to indicate that the case involved anything more than a negligent act causing mental distress. Very likely there was more in this case than now meets the eye.

8. 50 Ga. 134, 178 S. E. 537.

1. The writer would not have attempted to execute even this limited project if he had not been able to rely upon friends in the teaching profession for help. For great assistance in calling attention to significant decisions, acknowledgment is here made to Professor Warren A. Seavey of the Harvard Law School, Professor Harry Shulman of the Yale University Law School, and Professor Fowler V. Harper of the Law School of Louisiana State University.

2. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. R. 1033 (1936).

3. 126 Neb. 657, 253 N. W. 424.

This is undoubtedly the generally accepted view today, but the departures from it are sufficiently numerous to lend interest to Professor Magruder's conclusion that we may expect "the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquillity of so acute a nature that harmful physical consequences might not unlikely result, is subject to liability in damages for such mental and emotional disturbance, even though no demonstrable physical consequences actually ensue."⁹ The writer is willing to hazard the opinion that no injustice would be done by the adoption of such a principle.

MENTAL SUFFERING CAUSED BY NEGLIGENCE TOWARD A THIRD PARTY

If the law does not usually permit a recovery for purely emotional disturbance, a different result may follow when illness or bodily harm results from such disturbance. The Restatement adopts the rule that if a person intentionally or negligently causes emotional distress to another of such a character that it is likely to result in illness or bodily harm, he is subject to liability for such illness or bodily harm as actually results.¹⁰ The limitations upon this rule were tested in *Waube v. Warrington* (1935).¹¹ Here the plaintiff sought to recover for the death of his intestate alleged to have been caused by the negligence of the defendant who ran down and killed the intestate's daughter. The accident occurred in plain view of the mother as she watched her infant daughter cross the street in front of her home. Nervous prostration immediately resulted, followed by the intestate's death in seventeen days. Recovery was denied upon the ground that the defendant, while negligent with reference to the child, violated no duty which he owed to the intestate. The court thus decided (correctly in the opinion of the writer) the question which the American Law Institute stated but upon which it expressed no opinion in the caveat to § 313 of the Restatement.¹²

FALSE IMPRISONMENT

The privilege of the owner of chattels to impose such restraint upon one who wrongfully intermeddles with them as would otherwise amount to false imprisonment was definitely stated and sharply defined in *Collyer v. S. H. Kress Co.* (1936).¹³ In that case the defendant's store detective thought she saw the plaintiff stealing certain articles in the defendant's store and detained him about twenty minutes for investiga-

tion, after which he was turned over to the police. Subsequent prosecution of a larceny charge resulted in an acquittal of the plaintiff, and he brought an action for false imprisonment on account of the twenty minutes' detention prior to his arrest. In ordering judgment for the defendant, the court stated the following general principle: "Ordinarily, the owner of property, in the exercise of his inherent right to protect the same, is justified in restraining another who seeks to interfere with or injure it." More specifically the court held that "where a person has reasonable ground to believe that another is stealing his property," even though the offense has not actually been committed, "he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner." Furthermore, the court stated and applied the rule, which is well settled in actions for malicious prosecution, that "what is probable cause . . . is not a question of fact for the jury but one of law for the court, to be decided in accordance with the circumstances at the time of the detention." This decision, therefore, involves a significant extension of the rule stated in § 80 of the Restatement,¹⁴ which is quite in accordance with the spirit and purpose of that rule.

LIABILITY OF DEALERS IN FOOD STUFFS

The liability of dealers in food stuffs for the damages caused to the consumer by the sale of unwholesome foods continues to be a storm center of litigation. In such cases, liability is usually asserted upon two grounds; 1, breach of warranty, and 2, negligence. Under section 15 of the Uniform Sales Act, which has been generally adopted in this country, a warranty of fitness running to the immediate purchaser is clearly implied. Persistent attempts to extend the scope of this warranty so as to include members of the purchaser's family or others who might be expected to consume the food sold have met with scant success. The general rule that "warranties do not run in favor of any but an immediate purchaser"¹⁵ is generally applied.¹⁶

The difficulties of proof which confront a plaintiff who attempts to sustain an allegation of negligence in a case of this kind are often insuperable. Apparently the general adoption of pure food laws was thought to offer an easy solution of this problem. Consequently, in several recent cases¹⁷ we find that attempts have been made to charge the seller with "negligence as a matter of law" upon the ground of his alleged violation of such statutes. In none of these cases was the attempt successful. In the first of the cases cited below it was

9. Magruder, op cit. 1058.

10. Restatement, Torts.

"§313. EMOTIONAL DISTRESS UNINTENDED.

If the actor unintentionally causes emotional distress to another, he is liable to the other for illness or bodily harm of which the distress is a legal cause if the actor

(a) should have realized that his conduct involved an unreasonable risk of causing distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm."

11. 216 Wis. 603, 258 N. W. 495.

12. Restatement, Torts, §313.

"CAVEAT: The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm."

13. 5 Cal. 2d 175, 84 P. (2d) 20.

14. Restatement, Torts.

"§80. CONFINEMENT OR APPREHENSION IN DEFENSE AGAINST INTRUSION.

The actor is privileged intentionally to confine another or to put him in apprehension of a harmful or offensive contact for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels under the same conditions as are stated in §§ 77 to 79 as creating a privilege to inflict a harmful or offensive contact or other bodily harm upon the other for the same purpose."

The provisions of §§ 77 to 79 are elaborate and do not call for quotation here.

15. 1 Williston, Sales (2d) §244.

16. *Bourcheix v. Willow Brook Dairy, Inc.* (N. Y. 1936) 196 N. E. 617; *Holt v. Mann* (Mass. 1936) 200 N. E. 403; *Howson v. Company* (1935) 87 N. H. 200, 177 A. 656.

17. *Howson v. Company* (1935) 87 N. H. 200, 177 A. 656; *Bourcheix v. Willow Brook Dairy, Inc.* (N. Y. 1936), 196 N. E. 617; *Dressler v. Merkel, Inc.* (1936), 284 N. Y. S. 697; *Feinstein v. Daniel Reeves, Inc.* (1936) 14 Fed. Sup. 167.

The problem of negligence in cases of this kind is not treated at length in the Restatement. Some reference to it is made in the Comment to §401.

held that the statute in question was purely penal in its nature and that its violation was not an actionable wrong against the purchaser. In the second it was held that the statute was directed only against the adulteration of food and was not violated by the sale of milk alleged to contain broken glass. In the third case, where the plaintiff contracted trichinosis from eating sausages, the court said: "It was not intended by the statute to require of those engaged in legitimate trade something impossible of performance in the ordinary conduct of business carried on extensively according to accepted standards. There could be no 'adulteration' of food under the circumstances here shown." The hopes held out to exigent plaintiffs by the pure food laws have thus been blighted.

LIABILITY OF MANUFACTURERS

The law governing the liability of manufacturers and other suppliers of goods known to be dangerous for their intended use, which received its great impetus from the case of *MacPherson v. Buick Motor Co.*¹⁸ continues to develop generally in accordance with the rules stated in Section 388 and 395 of the Restatement.¹⁹ The liability there recognized extends only to bodily harm. Inferentially liability for other types of harm is denied. This limitation was the basis of the decision in *Creedon v. Automatic Voting Machine Corporation* (1935),²⁰ where it was held that the defendant was not liable for the negligent installation of voting machines which erroneously reported the plaintiff's defeat, thus necessitating an expensive recount. In a few cases, however, the rule has been extended to cover property damage, as in *E. I. DuPont De Nemours & Co. v. Baridon* (1934).²¹ There the defendant manufactured a seed disinfectant which was sold in packages containing directions for its use. The plaintiff bought from a middleman, and alleged that the disinfectant destroyed certain bulbs upon which it was used. It was held that the manufacturer was subject to liability in spite of the fact that the disinfectant was bought through a middleman and that the package bore a statement that no warranty as to results was given. The defendant contended that "because its

product was intended to affect only plant life, and property alone was subject to injury, it owed no duty to the plaintiff since it had no contract with him." "With that contention," said the court, "we do not agree." The court also quoted with approval the language of the Minnesota court in *Ellis v. Lindmark*,²² as follows: "That the negligence resulted in injury to property and not to the person should not prevent recovery." These cases seem to indicate that, here too, the law is in process of growth and that further development of the rules set forth in the Restatement may be expected.

The limitation of liability to those who might foreseeably be exposed to danger was the basis of the decision in *Harper v. Remington Arms Co.*,²³ where shells containing an unusually heavy load were manufactured by the defendant for use by arms manufacturers in testing guns. A box of these shells was given to the plaintiff by a friend and he was injured by the explosion of his gun when he attempted to fire one of them while hunting. It was held that the duty of a manufacturer of shells for testing purposes, to use care to prevent injury to the user, extended only to persons whose exposure to danger from that cause might reasonably have been anticipated.

CONDITION AND USE OF LAND

The many sided liability of a land owner for the condition and use of his land has been the subject of several recent decisions. From Pennsylvania comes a surprising revolt against the well established rule that, in the absence of warranty or deceit, a tenant takes the leased premises as he finds them and cannot recover against the landlord for injuries sustained by reason of defects contained therein. In *Deutsch v. Max* (1935)²⁴ the defendant owned a three-story, frame building which he leased for a term of three years as a grocery store and dwelling. At the time the tenant took possession, the wood balustrades of the second story porch were defective and decayed, as both the tenant and the landlord knew. Two and one-half years later, a domestic servant of the tenant, while shaking a carpet, fell when the balustrade gave way. For the injuries thus received the landlord was held liable to the servant. The principle upon which the case was decided was thus stated in the majority opinion: "This case is ruled by the principle that where a landlord lets premises in a ruinous condition or in a condition amounting to a nuisance, the landlord is liable for injuries resulting therefrom." The famous aphorism of Chief Justice Erle that "there is no law against letting a tumble-down house"²⁵ is thus repudiated in Pennsylvania. It may be doubted whether it is either accurate or helpful to characterize a condition of this kind as a nuisance. The author of a carefully prepared article in the University of Pennsylvania Law Review, prompted by the above decision, seems to be justified in stating that "It is wholly alien to the underlying conception of the theory of nuisance and its development in the common law to refer to a condition or activity which can only be injurious to a person who goes upon the land upon which it exists, as a nuisance."²⁶

Another startling decision comes from the appellate division of the Supreme Court of New York in the case of *DeRyss v. New York Central Railroad Com-*

18. 217 N. Y. 382.

19. Restatement, Torts.

§388. "CHATTEL KNOWN TO BE DANGEROUS FOR INTENDED USE.

One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

§395. NEGLIGENT MANUFACTURE OF CHATTEL; DANGEROUS UNLESS CAREFULLY MADE.

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."

20. 243 App. Div. 339, 276 N.Y.S. 609.

21. 73 Fed. (2d) 26.

22. 177 Minn. 390, 225 N. W. 395.

23. 280 N.Y.S. 862.

24. 318 Pa. 450, 178 A. 481.

25. *Robbins v. Jones*, 15 C. B. n.s. 221, 240.

26. Laurence H Eldredge, *Landlord's Tort Liability for Disrepair*. 84 U. of P. L. R. 467.

pany et al (1936).²⁷ In that case the plaintiff's decedent, while on property adjoining the railroad's right of way, was negligently shot by one Jerick who was endeavoring to shoot ducks with a rifle from a position upon a signal tower of the defendant. He was occupying this position at the invitation or with the acquiescence of one Hard, the defendant's signal maintenance man, who was also named as a defendant. The appellate division not only sustained the exception of the plaintiff to the granting of a nonsuit as to the defendant railroad, but made a further order directing a verdict and ordering judgment for the plaintiff against the railroad. The reasoning of the court merits attention. It was as follows: "Hard was under a duty to prevent the use of the signal tower or bridge by Jerick by virtue of the rules and instructions of the railroad company which were for the benefit of the public, including the decedent. These rules simply further the railroad's common law obligation, as one in possession of land, to make such reasonable use of it that others will not be endangered, and its corresponding duty not to allow its land to be used by individuals in a manner that endangered third persons. Hard's invitation to Jerick to use the property, or his acquiescence in such use, for the purpose of shooting ducks with a rifle, was a violation of duty toward the railroad. His omission to enforce the rules by way of excluding a trespasser so engaged was likewise a breach of duty to the plaintiff's decedent. The defendant railroad company was responsible for such uses of its property as occurred by reason of the act or omission of Hard." The *per curiam* opinion is very brief and it may be regretted that the court did not take occasion to elaborate, and establish more convincingly, the existence of the principles upon which this decision rests. The basis for the court's assumption that the rules of the railroad designed to exclude strangers from the structure in question "were for the benefit of the public including the decedent" might well have been stated. The court's casual reference to the duty of the railroad, as a possessor of land, "not to allow its land to be used by individuals in a manner that endangered third persons," would stand further exegesis. The statement that "the defendant railroad company was responsible for such uses of its property as occurred by reason of the act or omission of Hard" involves a question of agency which seems to merit more than passing notice. Only upon the dubious assumption that the question of agency was properly decided, can the case be justified under the rule stated in Section 318 of the Restatement.²⁸

If the two cases last mentioned indicate a tendency to extend the limits of a land owner's liability for the condition and use of his premises, a contrary tendency is discernible in the case of *Foley v. H. F. Farnham Co.* (1936).²⁹ In that case, the plaintiffs, while walking along a street in the City of Portland, paused to rest in front of the defendant's factory and seated themselves upon the sill of a doorway in the defendant's

building which projected within four inches of the street line. There was nothing to mark the dividing line between the street and the defendant's premises. The feet of both plaintiffs appear to have been upon the pavement. While in this position a sign, maintained by the defendant upon the front of the building, fell and broke the backs of both plaintiffs. The court ordered judgment for the defendant upon the theory that plaintiffs, by sitting upon the door sill of its building, became trespassers to whom the defendant owed no duty of care. The court seems to assume that if the sign had fallen while the plaintiffs were walking or standing in the street, the defendant would have been liable, upon the ground that it had failed to perform its duty to them as highway travelers,³⁰ but dismisses this consideration in the following language: "What happened, when and as it did, and not what might have happened in some other manner, is of present consideration."

Other courts might reach a different conclusion upon the facts of this case. It is plain that the vital issue was whether the plaintiffs lost their character as highway travelers by stopping to rest in the manner above described. Persons who erect structures within four inches of the unmarked boundary line of a city street must expect travelers to come in contact with them in the course of their normal use of the highway. A pause for rest when weary is obviously a normal incident of highway travel, and the fact that during such a pause these plaintiffs were in contact with the defendant's building, either sitting upon or leaning against it, may be regarded as a questionable ground for holding that they were no longer highway travelers.

LEGAL CAUSE AND DAMAGE

A puzzling problem of causation as related to damage was presented in a case which slightly antedated the publication of the Restatement³¹ and was subsequently the subject of an article by one of the judges who participated in the decision.³²

In the case above referred to, a boy standing upon an overhead beam of a bridge, lost his balance and was falling to rocks in the river bed far below. Serious injury if not death, was certain to result when he was caught upon the defendant's wires and electrocuted. The maintenance of the wires in a charged condition was found to be wrongful as to him. The decision allowed damages for only such sum as his prospects for life and health were worth at the moment when the defendant's fault became causal. This case stands for the proposition that in the absence of a concurrent wrong, a negligent party is not liable beyond the damages shown to have been caused by his negligence, and that in an action for injury to the person, the injured person's danger from other innocent factors at the time of harm must be considered. The decision, therefore, is at variance with the rule set forth in subsection 2 of

27. 201 N. Y. S. 279.

28. §318. DUTY OF OWNER OF LAND OR CHATTELS TO CONTROL CONDUCT OF LICENSEE.

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control."

29. (Me.) 188 A. 708.

30. Restatement, Torts.

§368. CONDITIONS DANGEROUS TO TRAVELERS UPON ADJACENT HIGHWAY.

A possessor of land who creates or maintains thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact therewith while traveling with reasonable care upon the highway, is subject to liability for bodily harm thereby caused to them."

31. *Dillon v. Twin State Gas & Electric Co.* (1932), 85 N. H. 440, 163 A. 111.

32. Robert J. Peaslee, *Multiple Causation and Damage* (1934) 47 Harv. L. R. 1127.

section 432 of the Restatement of Torts. The whole section reads as follows:

"§432 NEGLIGENCE CONDUCT AS NECESSARY ANTECEDENT OF HARM

"(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.

"(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about."

The first subsection above quoted states the fundamental "but for" rule. The second properly gives effect to the rule which imposes joint and several liability upon joint or concurrent tortfeasors for the results of their combined misconduct. If it went no further than this, it would seem to be unassailable. We are told in the comment, however, that "the statement in subsection 2 applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown." The Institute was here confronted with a split of authority and adopted the Minnesota³³ rule distinguished from the Wisconsin rule.³⁴

The thesis of Chief Justice Peaslee advanced in the article above referred to is that where the value of the thing harmed, whether it be property or human life, has been practically destroyed by the operation of an innocent antecedent force, the "but for" rule should preclude the recovery of full damages against a negligent actor whose conduct was also a contributing cause. The adoption of this view would eliminate the inconsistency in the law which is inherent in the two subsections of the Institute's statement above quoted, and give effect to the "but for" rule throughout the field in which the disciples of Jeremiah Smith learned to apply it.

33. *Anderson v. Minneapolis St. Paul & S. S. M. Ry.* (1920) 146 Minn. 430, 179 N. W. 45.

34. *Cook v. Minneapolis, St. Paul & S. S. M. Ry.* (1898), 98 Wis. 624, 74 N. W. 561.

An Independent Supreme Court

(Continued from page 260)

We have seen what the United States Supreme Court has done to protect minority groups in this country. There can be no doubt but what that Court, if its independence is maintained, will protect labor in case an administration ever gets in power which, stirred by a series of strikes and labor disturbances, and in response to popular demand, enacts laws forbidding the right to strike, to organize, and to otherwise act in ways necessary to preserve the rights of the working man.

That such a situation is not inconceivable is illustrated by the case of *Chas. Wolf Packing Co. v. Court of Industrial Relations*,⁵¹ in which the Supreme Court held unconstitutional the Kansas Compulsory Arbitration Act. This statute gave to an administrative board the power to fix hours and wages, and forbade em-

ployees to strike against the hours and wages which were set. This amounted to compulsory arbitration by a group of persons whom labor had little voice in selecting. The law was therefore opposed by organized labor.

If, because of certain other decisions which it does not like, labor works toward the destruction of the independence of the Supreme Court, it may well be that at some future date the worker will find that he has won a hollow victory and will long for an independent Supreme Court.

G. INDIVIDUAL CITIZENS WHO HAVE BEEN CHARGED WITH CRIMINAL ACTS

Many of the cases in which the Supreme Court has protected the individual against governmental oppression have also involved the protection of the rights of some minority group. These cases have already been considered. We now take up decisions in which, although the individual was not subjected to oppression because of his affiliation with any minority group, he nevertheless was threatened with the loss of his constitutional rights in regard to a fair trial. Although not strictly within the scope of an article dealing with the protection of minorities, unless that term include a minority of one, these cases are nevertheless of significance as showing the attitude of the Supreme Court toward the civil liberties of the American citizen.

One of the most striking cases of this sort is that of *Callan v. Wilson*,⁵² which was a petition for a writ of *habeas corpus*. The petitioner, together with other members of the same union, had been charged with the crime of conspiracy and, having been denied a jury trial, had been found guilty. It was claimed by the Government that the conspirators had endeavored to boycott and prevent certain other parties from working. The Government alleged that the conspiring members of the union planned to do this by refusing to work with these other parties or to work for anyone who employed them. The Supreme Court held that the Act of Congress denying the right to trial by jury was unconstitutional and that the petitioner had therefore been wrongly convicted.

In *United States v. Moreland*⁵³ the Court held that a Federal statute providing for imprisonment at hard labor without a presentment or indictment of a grand jury was unconstitutional.

In *Rasmussen v. United States*⁵⁴ the Court held that Congress had no right to authorize convictions in Alaska by a jury of only six persons.

In *Boyd v. United States*⁵⁵ the Supreme Court declared that statutes which in effect compelled one to be a witness against himself were unconstitutional.

The case of *Kirby v. United States*⁵⁶ held void an Act of Congress which provided that a judgment of

52. 127 U. S. 540.

53. 258 U. S. 433.

54. 197 U. S. 516.

55. 116 U. S. 616.

56. 174 U. S. 47.

51. 263 U. S. 532; rehearing at 267 U. S. 552.

conviction against the actual thieves should be conclusive evidence against an alleged receiver of stolen goods that the property had been stolen. This case emphasizes the right of every citizen to be confronted with the witnesses against him. Congress cannot provide that proceedings to which he was not a party shall bind him.

In *United States v. Cohen Grocery Company*⁵⁷ the Court held that a statute prohibiting an unreasonable charge for food was invalid.⁵⁸ There was no way that the citizen could tell what was meant by unreasonable. Such a vague law would make it possible to imprison citizens even though they had done their best to observe the law.

No citizen can tell when he will be charged with the commission of some crime which he did not commit. In a criminal proceeding the adversary party is the Government, so the importance of having the Supreme Court free from political influence is too obvious to require comment.

CONCLUSION

Our brief examination of the cases clearly illustrates that the Supreme Court during the long course of its history has acted in defense of the oppressed citizen. The decisions of the Court indicate a clear adherence to a definite philosophy. That philosophy is that the constitutional rights of the citizen cannot be taken away from him by the supremacy of legislative or executive power.

Adherence to this doctrine has been maintained by the Court even with the increased complexity of our civilization, the growing extension of Federal legislation, and the intensified centralization of government. This has been true regardless of the status of the citizen. In fact, there are many instances to show that the more humble the citizen the more vigilant has been the Court to protect him.

In extending this protection, the United States Supreme Court has never lost sight of the true function of a court of justice. This function was well phrased by the Supreme Court of Illinois in a case holding that certain military arrests which were made by order of President Lincoln were unconstitutional. Upon this occasion that court said:

"We are not unconscious of the fact that the decision which we are obliged to make in the present case on the facts appearing in the record . . . attributes to our late lamented President the unlawful exercise of power and therefore implies a certain degree of censure. None can have a higher appreciation than the members of this Court of the unselfish patriotism and purity of motive of that great Magistrate. If he exercised a power not given by the Constitution, he undoubtedly did so under a full con-

viction of its necessity in the extraordinary emergencies wherein he was called to act. But neither our honor for his memory, nor our confidence in his honesty, can be permitted to sway our judgment here. . . . If this plaintiff has been wrongfully restrained of his liberty, he has right to call upon us so to declare, without fear, favor or affection. It is unfortunate that cases having a political or partisan character should come before the Courts, but when they do so, we must declare the law as we believe it to exist. If we can know any other motive than the simple wish to expound it, or if, when our convictions are clear, we should hesitate to declare them without reference to what party it may please or what offend, we should betray the solemn trusts which the people have committed to this Court and bring dishonor on the administration of justice."⁵⁹

The President's Proposal as to the Federal Judiciary

(Continued from page 267)

of growth operating by natural processes. But the bill accompanying the President's message does not so read and we now learn that the President has no such thought in mind. Recurring to his "victory dinner" address on March 4, 1937, the key word was *now*. What he wants and proposes to get *now* is not a constant and natural infusion of new blood but power to make an immediate transfusion of his own blood into the courts to the end that they no longer function as check and balance in our constitutional form of government. Such a delegation of power in any hands would be a surrender of our constitutional liberties, and history teaches us that once surrendered they are never voluntarily restored.

In this same address the President spoke with moving eloquence thus of his great ambition.

"My great ambition on January 20, 1941, is to turn over this desk and chair in the White House to my successor, whoever he may be, with the assurance that I am at the same time turning over to him as President a nation intact, a nation at peace, a nation prosperous, a nation clear in its knowledge of what powers it has to serve its own citizens, a nation that is in a position to use those powers to the full in order to move forward steadily to meet the modern needs of humanity—a nation which has thus proved that the democratic form and methods of national government can and will succeed."

In this he has nobly spoken. Even his severest critics will fervently join in this radiant hope and earnestly strive for its realization.

But the President's frantic obsession of haste spells disaster. It must be recognized that, whether we like it or not, this nation is already committed to the spirit of collectivism in the sense that the national government has assumed responsibility for the operation of the national economy. Shall it take the form of directed economy or absolute collectivism which has already destroyed the democracies

(Continued on page 302.)

57. 255 U. S. 81.

58. In *Trenton Potteries v. United States*, 273 U. S. 392, the Court interpreted the Sherman Act so as to avoid the uncertainties resulting from so vague a test. While it is generally stated that the Sherman Act condemns only those restraints which are undue and unreasonable, the Supreme Court in the above case indicated that legality did not depend upon whether an agreed price was reasonable or not.

59. *Johnson v. Jones*, 44 Ill. 142, 161.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

FUNDAMENTAL *Issues in the United States: A Brief Study of Constitutional and Administrative Problems.* By E. A. Radice. 1936. Oxford University Press. 74 pages.—Again we are indebted to the Royal Institute of International Affairs for its sponsorship of a pocket-size brochure which gives a detached but keen analysis of the American scene. Writing in August of 1936, Mr. Radice sketched the salient controversies which have lately been intensified.

The starting-point of the author's discussion is his premise that "the permanent achievement of the United States lies in the fact that she has evoked a working legal mechanism to settle controversies which in Europe may lead to the use of force, or, at any rate, to constant friction and ill-feeling"; that "the legal and constitutional problems, which loom so large in the United States today, are the result of an attempt to establish the reign of law over a whole continent"; and that "a system of federalism, designed to avoid the evils of centralization on the one hand and the chaos of disunited national states on the other, is no doubt the ideal way of ensuring peaceful democratic rule over a large geographical area." Mr. Radice points out clearly that the maintenance of a federal structure based on delegations of limited powers to the National government, and a system of "checks and balances" as between executive and legislative branches of government, require as arbiter a judiciary of sufficient independence to be able to insure these divisions of powers.

Mr. Radice senses that there have been three periods in the economic and political life of the United States, and that the advent of the third period and its altered outlook have brought a new, severe challenge of the federal system, of the separation of legislative from executive powers and of the judiciary as arbiter of the boundaries erected by the people. In the early days of the republic, individual independence and opportunity lay in the free land, the open trails, and the little capital required for farming or for small business. The individual could and did make his own security. Then came the era of business expansion, and the individual strove eagerly for a chance to rise in "the industrial hierarchy." As Mr. Radice puts it, "there was until recently . . . no class whose hopes of economic betterment could be satisfied only at the expense of the rich. . . . The propertyless classes were too busy staking out a claim for themselves, to be interested in politics." The large-scale developers of new productive technique had then more to offer to the bulk of the people than had those who preached "the curse of bigness."

"The significance of the depression of the 1930's", as Mr. Radice sees it, "lies in the fact that the period of American expansion seems to be over." The tra-

ditional concepts of individual independence and opportunity, based on acquiring and holding property, are no longer defended tenaciously by the average citizen, as the depression taught him that property may be created or destroyed "mainly by social forces outside his control." So the demand for security has arisen in a new and social form—security for bank deposits, for such investments as may be left, for equality in wage bargaining, for the worker in old age, for the casualties of complex and competitive industry.

Mr. Radice sketches the struggles and the failures so far, and says that "when in April of 1935 the Supreme Court unanimously declared the N.R.A. unconstitutional, it was in fact passing a death sentence on what was already a corpse." The fundamental reason for this break-down he ascribes to the unreadiness of the economic system "for such a degree of centralized regulation." His verdict is that "the New Deal as it stands in 1936 . . . has left the economic system of the United States far more individualistic than that of most European countries."

Writing as the National campaign of 1936 took form, Mr. Radice said, as to the Supreme Court:

"At present the Court consists of a Chief Justice and eight associate justices. The Constitution nowhere lays down how many justices there shall be. It would therefore be possible for a President with the backing of the Senate to pack a recalcitrant Supreme Court with members of his own party. Only once has it ever been suggested that this was done. There is no doubt that recourse to such an action would be highly unpopular in the country, since for the mass of Americans the Constitution is the supreme guarantee that they shall be ruled by laws rather than by men. Whatever its decisions, the Court retains the respect and reverence of the country because it is the supreme interpreter of the highest law."

In the final analysis, the author comes to grips with the baffling tasks of efficiently administering the bureaucracy (civil service) of a centralized and socialized government, and then what he calls "the most important issue" on the economic side, that of public finance and mounting taxes, which may prove the deciding factor and send to the scrap-heap the promising superstructure so far built.

Mr. Radice does not discern or discuss some issues which seem important to us embroiled in the controversies of the American crisis. For example: He does not discuss the maintenance of independent and discriminating public opinion, fostered by institutions in which the public has confidence, such as the unfettered universities, a free press, the radio if it can be kept from political domination, and the learned professions. Nor does he rank the judiciary as an agency of detached and deliberate judgment; he sees its function as mainly that of arbiter of constitutional

questions, which is far from the fact. But if you wish an independent observer to help you check and appraise just how far the United States has traveled along the road, Mr. Radice's little volume may serve as a useful guide.

WILLIAM L. RANSOM.

New York.

Judges and Law Reform. By Sam Bass Warner and Henry B. Cabot. (Studies of Crime and Criminal Justice in Boston, conducted by the Harvard Law School, Vol. IV). 1936. Harvard University Press. Pp viii, 246. (\$3.00).—This is a valuable and most suggestive book, such as we should expect from any study with which Mr. S. B. Warner is connected, and it constitutes not only an important contribution to the series to which it belongs but also to the age-long discussions over judicial procedure. The reader, then, must not approach it merely because it deals with specific jurisdictions such as Boston and Massachusetts, for, as a whole, it rises to general principles in connection with petty cases, the quality of justice, trial by jury, and so on. Indeed, so excellent is the research and so wide the facts that the volume takes on the color of a social document in relation to the whole problem of criminal administration. It may be said at once, and this indeed in no patronizing manner, that no machinery for the administration of criminal law, no changes in it, substantively or adjectively, contain creative hope for either society or the criminal unless the public insist on (1) an incorrupt and incorruptible judiciary with security of tenure, of whom we can postulate both *non posse peccare* and *posse non peccare*, and (2) an equally pure detective and police force. Until these are substantially forthcoming, law reformers, who seek the man behind the criminal, are in the main beating the air, except in so far as their research may contribute to the progress of educating the essential and public opinion. In this connection, the volume ought to constitute a genuine element of real assistance. Perhaps its most distinctive suggestion is that Massachusetts should acquire "a disposition tribunal" through which guilt-finding should be separated from sentencing,—the latter being left to a tribunal on which representatives of the social sciences—psychology and sociology for example—should sit. Now, presuming that these conditions of judicial and police personnel referred to were satisfied, we venture to offer some opinions with great diffidence and restraint. Is it possible to imagine in the United States, with its strong bias in favor of "rights," that the sentenced prisoner would not practically be given a re-hearing and demand and obtain "expert" support? At any rate, we believe that this would be so in our own common-law jurisdictions. Thus we would pile "expert" on "expert" *ad infinitum* if not *ad nauseam*. We are all in favor of using every means in our power to benefit the criminal, and we hold no brief for a rough and ready justice, however pure. On the other hand, just as we have been unable to make great deviations from the Macnaughton rules, [1843] 10 Cl. & F. 200, because the "experts" of even such advanced sciences as medicine and psychiatry are in such obvious conflict that proof is difficult, so we fear the opening up of even the disposition-process to the varieties of specialized virtuositities. For no one can deny that the so-called sciences of human behavior are as yet too infinite in their differences to be of real assistance—and it is *real* assistance that we seek. This is, of course, personal and without prejudice to further research. In addition, it is specially written to draw attention to one

of the most important chapters in a book which is informed throughout with a thorough conception of the social function of law, and which stands as a bold indication, as Holmes said (*Collected Legal Papers*, pp. 225 ff.), that the black-letter lawyer must give place to the man of statistics, whose work consists in the establishment of postulates based on accurately measured social desires instead of outmoded legal traditions.

W. P. M. KENNEDY.

University of Toronto.

International Legislation, A collection of the texts of multipartite international instruments of general interest, edited by Manley O. Hudson with the collaboration of Ruth E. Bacon. Volume V, 1929-1931, Nos. 230-303. 1936. Washington: Carnegie Endowment for International Peace. Pp. xxxxi, 1180.—This bulky volume covers the multipartite international instruments from July 1, 1929 to December 31, 1931, a period of two years and a half. It contains seventy-three distinct conventions in 1169 pages which may be compared with the average of fifty-eight conventions printed in each of the first four volumes of the series in about 800 pages. Each of these four volumes covers about two and a half years in the period 1919 to 1929. It thus appears that, in spite of the depression and the tendency toward national isolation which it brought in many countries, the output of international legislation increased by nearly thirty per cent after 1929.

The texts are reproduced in most cases in English and French, although for Pan-American conventions Spanish is substituted for French. Each text is preceded by an historical note, list of ratifications and bibliography. Care has been taken to include the date of entry into force and the League of Nations registry number in each case, although documents open for signature during the period are included, even though they have not come into force.

Among the instruments of special interest in this volume are the Geneva Red Cross Convention of 1929; the Convention to Improve the Means of Preventing War, 1931; the London Disarmament Convention, 1930; the instruments relating to the final stages of the reparations problem and those relating to the proposed American adhesion to the World Court Protocol. There are a large number of conventions codifying law with respect to international commercial transactions, maritime law, nationality, communications and transit.

This publication of texts, many of which are extremely difficult to find elsewhere, has become indispensable to persons engaged in international affairs and it is to be hoped that the eminent judge of the Permanent Court of International Justice will find it possible to continue his editorial supervision of the series.

QUINCY WRIGHT.

University of Chicago.

American Prisons, a Study in American Social History Prior to 1915. By Blake McKelvey. 1936. Published by the University of Chicago Press. Pp. 242.—*American Prisons*, by Blake McKelvey is a valuable book. It is obviously the result of much intelligent and painstaking research into corners of American sociological history that have rarely been swept.

The nearest thing to Dr. McKelvey's work was the volume published in 1922 by Dr. Orlando F. Lewis, for many years Secretary of the Prison Association of New York. Dr. McKelvey has given not only much original data as to the origin and development of prisons

in America but he has accompanied the recital of little known facts by some extremely valuable philosophical observations. His attitude towards the prison problem is one of keen intellectuality but not of undue criticism. Apparently the degree of Doctor of Philosophy was well bestowed upon the author. To the student of penology or the practical prison administrator who desires to be intelligent on the problem, Dr. McKelvey's volume is indispensable.

For nineteen years this reviewer has spent most of his waking hours in contemplation of the prison problem in America and read most of the American criminology works but I have found information in this volume that I had not seen disclosed in any of the published books on criminology. For example, not content with commenting upon the development of the rival systems of cell-construction which every student of penology knows as the Auburn and Pennsylvania systems, Dr. McKelvey clearly explains the reasons for and the philosophy behind these two systems of prison building. He gives us sidelights upon the personalities and peculiarities of the early prison reformers in Boston, New York and Philadelphia, discloses much little known history in connection with Southern prison development and is frank enough to link the slow progress of prison reform in the South with the almost insoluble problems growing out of race hatred. The rise and decline of the Brockway reformatory movement is discussed in a penetrating manner and the westward movement of penology through the frontier regions is interestingly and dramatically portrayed. Even though this book may not have a large circulation among those who seek sensation in the field of criminology, Dr. McKelvey has the consolation of knowing that he has made a permanent contribution towards the solution of a most difficult problem.

SANFORD BATES.

New York.

Legal Aspects of Milk Control, by James A. Tobey. 1936. International Association of Milk Dealers. Pp. 102.—To measure the extensivity of milk control is simply to feel the pulse of one phase of *laissez-faire* economics. From the earliest stage of its development to the present day, legislation in the form of statutes, ordinances and administrative orders designed to protect the consuming public from the hazards of unsanitary and unwholesome milk has had rather easy sledding through our courts. This Dr. Tobey has well illustrated. Price Control, on the other hand, has not had such a fortunate treatment at the hands either of the courts or of the author. Despite the rather abrupt assertion on page 18 that "a State may adopt legislation providing for reasonable regulation of the minimum and maximum wholesale and retail prices of milk", the fact remains that no effective *maximum* price regulation of that commodity exists. The distributor still manages to retain his "spread" of the profits, while the embattled farmer at one end and the unsuspecting consumer on the other are being effectively "milked." In the foreword the author was urged to go "more deeply into the survey of decided cases". Unfortunately, Dr. Tobey has fallen short of his assignment. The surface has been quickly surveyed, but there has been no venture beneath it for the necessary "depth".

JULIUS COHEN.

West Virginia University.

Federal Commissioners, A Study of Their Careers and Qualifications, by E. Pendleton Herring. 1936. Cambridge: Harvard University Press. Pp. 151.—The latest addition to the Harvard Political Series comes at a time when considerable legal attention has been riveted on federal bureaus by the American Bar Association's Plan for an Administrative Court, the President's Reorganization Plan, and the current proposals in Washington to attract a higher type of personnel to government service. The author's facts are both interesting and indisputable. They develop the personal, professional and political backgrounds of some 143 men who have served on 8 important federal boards or commissions since 1887.

His tables reveal the following highlights: 70 had college degrees, 38 were lawyers and 14 swung Phi Beta Kappa keys; 21 were over sixty years old when appointed, 68 were between forty-five and fifty-four, and 4 were under thirty-five; 14 died in office and only 22 served for ten years or more; the east and middle-west contributed more men than other parts of the country; political party division was about equal; 23 were Presbyterians, 17 Episcopalians, 9 Baptists, 6 Catholics and 6 Methodists; 56 were reappointed, 17 to third terms, 4 to fourth terms and 1 to a fifth term; 30 have published one or more books; 65 were drawn from public service elsewhere—19 from the Congress, 18 from state utility commissions, 15 from federal legal staffs, while only 12 came from the business world which all were destined to regulate.

Aside from condemning or praising the obvious, Professor Herring's interpretation of his facts makes little apparent progress in either defining or solving the problem of increasing the caliber of government employees. He criticizes low salaries which drive able men such as Joseph P. Kennedy, late SEC chairman, back to the pursuit of their private fortunes; he dislikes the presently accepted political tenet that congressional lame ducks shall find sanctuary on a federal board; and he emphasizes the altogether too brief tenure of desirable officials as well as the difficulty of eliminating those who have demonstrated themselves to be unsuited to their work. On the other hand, he cites the career of Commissioner Charles D. Mahaffie of the Interstate Commerce Commission to prove that it is perfectly possible for an intelligent college graduate to fight his way through the civil service ranks to the top.

Professor Herring notes that British civil servants uniformly come from the "upper middle classes" and are educated at Oxford or Cambridge. Obviously, the kaleidoscopic backgrounds of his American subjects defy any such generalization. Why do our best brains jump from college to private pursuits instead of to the Government? This question is being asked with greater frequency every day but one need not, I think, look far for the answer.

The British offer two very important inducements which are sadly lacking in the American scheme. The more important is a reasonable financial security for the embryo statesman and his family, both during his tenure of office and retirement. The second is the professional and social recognition by which the British government rewards faithful service. Human nature varies little on the two shores of the Atlantic and the practical effect of financial independence together with at least a knighthood during one's declining years must not be ignored.

Compare this vista with the prospects of the American public servant. His family has barely been able

to live on his salary, to say nothing of saving for old age. Retirement is automatic at the age of 70. Health permitting, a paltry pension forces him to open a law office in Washington for practice before his old bureau. There is seldom anything wrong in such a practice; in fact his only exclusive service is usually the expediting of his matters through personal contacts with bureau personnel, although his clients would be shocked to learn this. When these friendly short cuts through red tape are lost by the next change in the bureau's personnel, the practitioner's usefulness, even in this pitiable capacity, is definitely terminated and he sinks into oblivion. Why indeed does Young America prefer business to Government?

Perhaps this comparison over-simplifies the problem. The basic issue may involve a difference between the two nations themselves—between the desirably stereotyped civil servant in England and the hodgepodge of inconsistencies which comprises our public officialdom. Where else, for instance, but in America could a self-educated locomotive engineer such as Frank McManamy turn in a record as an Interstate Commerce Commissioner which compares favorably with that of the eminent Judge Cooley? Confronted by a myriad of comparable paradoxes from the field survey, Professor Herring's difficulty in rationalizing them is not hard to understand.

McKENZIE SHANNON.

Washington, D. C.

The Criminal Code of Japan, by William J. Sebald. 1936. Kobe: Chronicle Press. Pp. viii, 287.—Mr. William J. Sebald, an international lawyer of Kobe, Japan, has rendered an invaluable service to Japanese law in particular and Western law in general by making available in an unusually attractive volume the criminal code of the Japanese empire. It is clear at once to anyone familiar with comparative legal systems that the chief difficulty in translating from Japanese to English is the selection of words which are exact enough to convey the original meanings. Mr. Sebald has been successful in rendering an English edition of the criminal code which cannot fail to meet the approval of all Japanese scholars who are capable of using this foreign medium of expression.

Even a superficial reading of this code will show it to be a liberal collection of laws. Herein extensive powers are given to the courts. Furthermore, first offenders are regarded as exceptional cases and sentences are increased only for repeated violations. An advantage these laws have over many in other parts of the world lies in the fact that detailed definitions of crimes are avoided, whenever possible, thus eliminating many of the difficulties encountered in Western courts during the prosecution of a case.

The author, in his preface, writes that "no attempt has been made to present the decisions of the Supreme Court as an orderly body of case law, principally because Japan has not adopted the doctrine of *stare decisis*, and to do so might easily give rise to erroneous conclusions. Hence, upon almost identical facts, contrary decisions are often reached. Many such instances will be found in this work. . . . On the whole, however, it is probably safe to say that the Japanese Supreme Court engages less in legal hair-splitting or in making fine distinctions than do many of our Western courts. At any rate, the nature of the *Criminal Code* would make it unnecessary to do so."

THOMAS E. ENNIS.

West Virginia University.

Measuring Intelligence: A Guide to the Administration of the New Revised Stanford-Binet Tests of Intelligence, by Lewis M. Terman and Maud A. Merrill. 1936. New York: Houghton Mifflin Co. Pp. 661.—Twenty-one years ago Dr. Terman inaugurated a new era in educational procedure by the publication in *The Measurement of Intelligence* of his Stanford Revision of the Binet-Simon Test which soon became and has continued to be the standard clinical method for the evaluation of intellectual status. Through that book the American public became familiar with the expressions "mental age" and "intelligence quotient", or "I. Q.", if not in all cases understanding them; courts and other organizations granted official sanction to these findings. For instances, says the American Prison Association, "Those having an intelligence quotient over seventy according to the Terman Revision of the Binet-Simon are not classified with the feeble-minded."

In the present volume, Terman, with the collaboration of Dr. Merrill, offers the results of ten years' labor in revising and extending the original scale. To safeguard against coaching and to permit retesting, two scales of equal validity and difficulty replace the original one. Mental ages as low as two may now be tested; more adequate sampling of the higher levels of intelligence is also provided. The author does not claim perfection for his work, since the measurement of complex mental processes can never be as precise as those in the physical domain; nevertheless standardization has been most careful, based upon the responses of three thousand native-born subjects of average social status drawn from eleven states. Thousands of items suggested as indicators of intelligence were provisionally tried before the final selection. The original fifty-four tests of Binet have been increased to a hundred and twenty-nine to fulfill Galton's desideratum of obtaining an objective knowledge of the capacities of man by sinking exploratory shafts at critical points. In his clearly written book Terman describes the various tests to be given, and administrative techniques as well as supporting theory; trial lawyers to whom the definition of feeble-mindedness is of importance will find this an indispensable manual.

JAMES HARGAN.

Sing Sing Prison, New York.

The Supreme Court and Political Questions, by C. G. Post, Jr. 1936. Baltimore: Johns Hopkins Press. 1936. Pp. 145. \$1.50.—Dr. Post's interesting study of "political questions" is almost the first attempt to analyze critically different concepts in American constitutional law. It is, of course, generally recognized that determination of matters involving foreign relations and the internal political structure of our states has been generally left to the executive department by the Supreme Court. What Dr. Post has done is to bring together the cases in these two fields (principally in the field of international relations) and to subject them to critical analysis and comparison. In a concluding chapter he has dealt with political questions as "a category of the judicial thought process". With a refreshing realism the author recognizes that the court has not infrequently departed from the strict dogma of political questions, especially in dealing with problems of internal order. He cites the case of *Texas v. White* as an example of the court's willingness to ignore the doctrine in a situation where "expediency" indicated the necessity of a restoration of state equality after the Civil War. He quotes two interesting passages from private letters by Mr. Chief Justice Chase

to indicate how clearly at least one justice recognized a political effect of departing from the rule of non-decision of "political questions". Other examples, especially surrounding the treatment of Indians, are examined by the author, notably *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.

The author's conclusion that the category is itself a fluctuating one suggests to him the dictum that "many questions now deemed justiciable by the Supreme Court may at some future date be considered political questions because of the 'felt necessity' to realize anticipated consequences. If as a consequence of the change of economic conditions, certain problems of government, now within the jurisdiction of the judiciary, might more effectively be settled by the political departments, it would seem likely that the Supreme Court would denominate such problems political questions." In the present issue over the Supreme Court it would, indeed, be interesting were this dictum applied by it to some of the current controversial issues of social and economic policy. It may be doubted, however, whether this sort of judicial self-limitation is likely to be utilized by the court to escape the present dilemma. Indeed, the general climate of opinion on the issues themselves must undergo much more radical transformation before it will affect the transfer of such issues to the category of political questions.

* *

Sam Adams: Pioneer in Propaganda, by John C. Miller. 1936. Boston: Little, Brown and Company. Pp. 437.—Sam Adams was not a lawyer, but he was, on the whole, the most effective of the New England revolutionists, the friend of lawyers, and very often their advisor on the strategy of Revolution. This biography is the first to appear in modern times. It provides not only an intimate study of the man and his work but a lively and entertaining account of the Boston caucus and the New England revolutionary movement. Not only was he the pamphleteer extraordinary of his day in Boston, but the architect of the whole system of the Committees of Correspondence which proved so effective an instrument of propaganda and action for the revolting colonists. And indeed it can be said without exaggeration that Sam Adams was more responsible than any other single individual in Massachusetts for insuring the ratification of the new constitution. He sat as the acknowledged leader of the anti-Federalist forces, and up until the last day was the most dangerous opponent of the constitution. For if he had finally refused his assent, the upstate farmer representatives would have voted solidly behind him against the constitution and defeated it. Dr. Miller's study is an urbane and delightful portrait of a man and a period. The period was the true flowering of political New England, and the man one of its most singular but thoroughly native plants.

* *

The Role of Politics in Social Change, by Charles E. Merriam. 1936. New York: New York University Press. Pp. vii, 149.—It would be interesting to read—and reflect on—the comments of Mussolini, Hitler, and Stalin on this penetrating critique of the conditions and the limits of political action by those in power. For Professor Merriam, who, in his study of "Political Power" has explored its philosophical foundations, here examines the techniques by which political control can be made effective. These three spectacular exponents of control by violence would no doubt impatiently ignore the author's caveats on the

permanence of government by *coup d'état*—only to miss his incisive prescriptions for its conversion into rule by consent.

Professor Merriam begins by examining the inadequacies of the Marxian dialectic for explaining the possible procedures of administration. He wastes no time on the fascist metaphysics of power, since his interest lies in how power is to be translated into practical day-to-day operation of the vast complex of a modern industrial society. He discovers and examines elements common to "state, church, or guild" in "any cycle of development of a power pattern". It is these common elements which define the efficacy of control in action. Beside—and after—the techniques of violence, national or international, there remain science and technology, education, and persuasion—condition—legislation. True leadership lies in following problems where they lead, "through the complicated labyrinths of human life, through interests, ideals, values, following the way to effective forms of regulation which promote the happiness and security of mankind, no matter by what name they may be called". So the "strategic controls" can be directed to the general not to a partial welfare, whether in the name of a race, a class, or a governing oligarchy. In a final chapter he applies this criterion to national planning and outlines the directions it is likely to take.

Here is a trenchant and provocative study of the technique of power. Unwilling to accept the clichés of those who seek easy short-cuts by violence, and unafraid to utilize experimental processes to achieve attainable goals by slower but more permanently effective strategies of control, the author projects a philosophy and a program for the organization as well as the use of power.

PHILLIPS BRADLEY.

Amherst College.

The Commonwealth of Industry: The Separation of Industry and the State, by Benjamin A. Javits. 1936. New York and London: Harper & Brothers. Pp. 229.—The troubled years of the depression have produced many plans for remaking government and industry. Heretofore, all such plans have come from academicians, journalists, engineers, industrials and some common rabble-rousers of little distinction. This book presents the first such plan advanced by a lawyer—one who has offices on Broadway and an extensive trade association practice.

The central idea in this plan is clearly stated in the sub-title: "the separation of industry and the state". The author sees the remedy for all or nearly all economic and political ills in the establishment of an industrial state, within but independent of the political state. With the trade associations as a nucleus, he would allow and encourage all producers to combine by industries to control production, fix prices, distribute profits, extend credit to consumers, and guarantee employment to all able-bodied workers. These trade associations would be grouped into, say, six major divisions, which would name representatives to the governing body for all industry, the National Economic Council. To this "commonwealth of industry" the political government is to surrender all of its regulatory powers and is thereafter to be confined to its time-honored protective functions and to caring for the unemployables. Only the courts are to have any supervision over the agreements entered into by a majority of the producers, which are to be enforceable against recalcitrant minorities. To the courts, the author would assign the vitally necessary function of safeguarding the rights and liberties of the

people against possible abuses in industrial self-government. In this industrial self-government, management is to have the controlling voice. Labor is given only minority representation, and for this is expected to surrender its unions and collective bargaining. Consumers will be protected against exorbitant prices only by the courts, and stockholders will have to adjust themselves to the idea that the purpose of industry is economic welfare of all the people, not profit to a few owners at the expense of other producers and the general public.

The author regards this plan as the only possible way in which the full benefits of the machine and power age can be secured without loss of the people's liberties. He sees it as an alternative, not only to communism and fascism, but to world war. He believes it to be in line with everything that is best in our American traditions and as being attainable without even amendment of the Constitution. As he sees it, the entire plan can be initiated through the voluntary action of industry, if the political government will but give it a free hand to proceed without interference or attempted control other than by the courts.

To the reviewer, the plan seems impossible of attainment and a much more radical proposal than the New Deal. But whether it is radical or conservative, practical or impractical, this book merits attention as a logical development of the proposals for industrial self-government, which have considerable support at this time, particularly in trade association circles.

EDWIN E. WITTE.

University of Wisconsin.

President's Proposal as to the Federal Judiciary (Continued from page 296.)

of continental Europe, or shall we follow what may be called a compensated economy or free collectivism under which our free institutions may endure?

We take it the President desires the latter, but the unmistakable trend and effect of his policies are fast accomplishing the deadly aim of the former, and he blithely tells us that he has just begun. Could anything accelerate this course more than delegation of the power sought in his message and bill? If granted, can it be doubted that this power would be in wrong hands?

Long ago, Cicero in his Letter on "Old Age" said: "If you will take the trouble to read or listen to foreign history, you will find that the mightiest States have been brought into peril by young men, have been supported and restored by old. The question occurs in the poet Naevius's Sport:

"Pray, who are those who brought your State

With such despatch to meet its fate?"

"There is a long answer, but this is the chief point:

"A crop of brand new orators we grew
And foolish, paltry lads who thought they knew."
Jefferson City, Mo.

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Arrangements for Annual Meeting, Kansas City, Missouri

September 27—October 1, 1937

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	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
	\$	\$	\$	\$
Aladdin	2.00 to 2.50	3.00 to 5.00	4.00 to 7.00	
Ambassador	3.00 to 4.50	5.00 to 8.00		
Baltimore	3.00 to 4.00	4.00 to 9.00	5.00	10
Bellerive.		5.00	6.00	8 & up
Bray	2.00 to 3.00	3.00 to 5.00		
Commonwealth .	2.50 to 3.00	4.00 to 5.00	5.00 to 6.00	8
Kansas Citian... 2.50 to 3.00			3.50 to 6.00	10
Phillips	3.50 to 4.00	5.00 to 7.00	6.00 to 8.00	8 to 15
Pickwick	3.00 to 4.00	4.00 to 5.00	5.00 to 6.00	
President	2.50 to 4.00	3.50 to 5.00	4.50	
Robert E. Lee. 1.50 to 2.50	2.50 to 3.50	3.50 to 4.00		
Savoy	2.50	5.00		6 to 12
Sexton	2.00	3.00	5.00	
Stats	2.50 to 3.50	3.50 to 5.00	6.00 to 7.50	
Westgate	1.50 to 2.50	2.50 to 3.50		

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

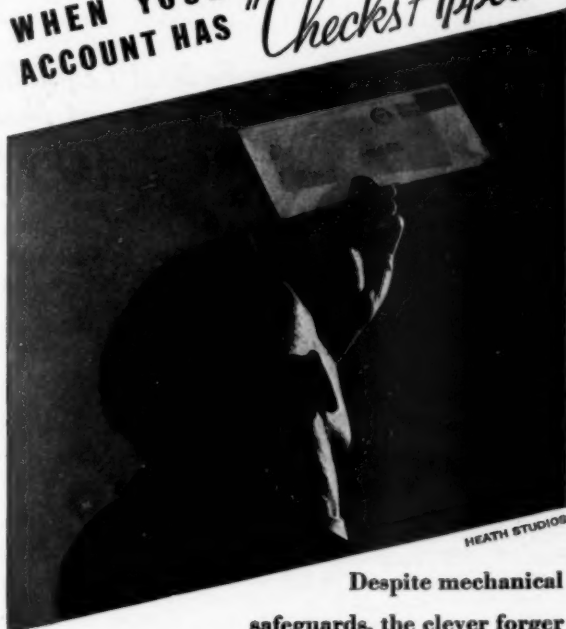
A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

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Current Events

Report of Committee on Federal Legislation of the Association of the Bar of the City of New York on Pending Federal Court Proposals

SINCE the proposals with respect to the Supreme Court of the United States and the other Federal Courts were given to the public by President Roosevelt and embodied in Senate Bill 1932 and House Bill 4417, committees of various bar associations have considered them and made reports. One of the earliest of these, and certainly one of the most acute analyses of the measure, was the report presented by the Committee on Federal Legislation of the Association of the Bar of the City of New York, and approved by that organization at a special meeting in Feb. 24, 1937, by a vote of 517 to 88. Following is the report in full:

On February 5, 1937, the President transmitted to Congress a Message upon the Judiciary, with which he submitted a letter from the Attorney General and attached a draft of a proposed Bill which has been introduced in the House of Representatives as H. R. 4417 and in the Senate as S. 1392. Copies of the Bill, the President's Message and the Attorney General's letter are attached.

If this Bill becomes law the President will be required to nominate and, with the advice and consent of the Senate, to appoint, six new Justices of the Supreme Court. The membership of the Court will thereby be permanently enlarged from nine to fifteen, unless one or more of the senior six Justices shall retire or resign before such appointments are made. In that case the President will still be required to appoint six new Justices by appointing an additional Justice for each of the six senior Justices who does not retire or resign and filling the vacancies of those who do. He will also be required to nominate and appoint additional Judges in the Circuit Courts of Appeals, the District Courts, the Court of Appeals for the District of Columbia, the Court of Claims, the United States Court of Customs and Patent Appeals and the Customs Court, whenever any of the Judges of these courts have become eligible for retirement and have failed to retire within six months thereafter. No more than fifty Judges, including Justices of the Supreme Court, may be appointed under the provisions of the proposed Bill.

In the Circuit Courts of Appeals and

in the Court of Appeals for the District of Columbia there are at present six judges eligible for retirement or entitled to resign and be paid their full salaries under existing statutes. In the District Courts there are thirteen. Unless these Judges resign or retire the President will be required to add additional Judges to the courts in which they sit.

The proposed law makes special provision for the transfer of the additional Circuit and District Judges from the circuits or districts in which they are appointed for service in other circuits and districts. It also provides for the appointment by the Supreme Court of a Proctor, whose duties are to obtain and publish information as to the volume, character and status of litigation in the District Courts and Circuit Courts of Appeals, to investigate the need for the assigning of District and Circuit Judges to other courts, to recommend methods for expediting the disposition of cases, and to perform other duties consistent with his office as the Court shall direct.

The President, in his Message, predicates his proposal that he be authorized and required by Congress forthwith to nominate, and with the advice and consent of the Senate to appoint, six new Justices of the Supreme Court of the United States, upon the assertions that the personnel of the Federal Judiciary is insufficient to meet the business before them, and that those Judges who have passed the age of retirement are or may be incapacitated by the infirmities of age. These assertions can have no application to the business of the Supreme Court or to the capacity of its members. So far as the lower courts are concerned it appears that with four possible exceptions none of the District or Circuit Judges required to be appointed forthwith is needed in the court to which he must be appointed. These facts are a matter of public record. A table is annexed hereto showing the appointments to be made and the condition of business in the courts to which the judges will be appointed.

Thirty days before the President delivered his Message to Congress the Attorney General of the United States transmitted to the Senate and House of Representatives his Annual Report, containing the Report of the Chief Justice

of the United States as presiding officer of the Judicial Conference, which held its annual session in Washington on October 1, 1936, together with the Report of the Solicitor General. The Report of the Judicial Conference and the Reports of the Attorney General and of the Solicitor General fully disclose the condition of business in each of the courts of the United States.

The Supreme Court

The Report of the Solicitor General, referring to the work of the Supreme Court, stated:

"During its October term, 1935, the Supreme Court disposed of 986 cases on the appellate docket, a larger number of appellate dispositions than at any of the 10 preceding terms, except the 1933 term, when 1,025 cases were disposed of. Every case argued or submitted at the term was disposed of before adjournment."

"* * * The work of the Court is current and cases are heard as soon after records have been printed as briefs can be prepared."

No additional members of the Supreme Court of the United States are required in order to expedite its business. In fact, to increase the number of Justices would hamper and delay the dispatch of its business, because its decisions must be reached in conference in which all the Justices participate. Professor Felix Frankfurter thus wrote in *Encyclopaedia of the Social Sciences*, volume 14, at page 478:

"* * * There is no magic in the number nine, but there are limits to effective judicial action. Deliberation by the court is the very foundation of sound adjudication, as is also a lively sense of responsibility by every member of the court for its collective judgment. Experience is conclusive that to enlarge the size of the Supreme Court would be self-defeating. When this recurring proposal for increasing the number of justices was once more made by the American Bar Association in 1922, Chief Justice Taft authoritatively rejected it."

"* * * A contemporaneously shifting personnel would disastrously accentuate the personal factor in constitutional adjudications, and divisional courts within the Supreme Court would require a mechanism for adjusting conflicts among the divisions. Happily these devices never attained enactment. But their persistent advocacy delayed the only efficacious remedy. Not till 1891 did Congress pass the requisite legislation. Instead of increasing the size of the

court, it decreased its business."

Their work demonstrates that none of the Justices is incapacitated by reason of age for the full performance of all of the arduous duties of his office.

Furthermore, if the proposal be to keep from the bench Justices over 70, it is ineffective. No Justice over 70 need resign or retire under the provisions of the Bill. On the other hand, if the objective be to increase the number of Justices, not one additional Justice will be appointed to or sit in the Supreme Court of the United States at this time by virtue of the provisions of the Bill if Justices over 70 do resign or retire.

The President's proposal to increase the membership of the Supreme Court is based in part at least upon an entirely erroneous conception of the functions of that Court as they have been developed under the provisions of the Judiciary Act of 1925. Upon the fact that out of 803 petitions for review filed by private litigants at the last term of court, only 108 were granted, the President predicates the following query:

"* * * But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 per cent. of the cases presented to it by private litigants?"

The President concedes that many of the refusals to grant petitions for review "were doubtless warranted."

Prior to the Judiciary Act of 1925, because of its general appellate jurisdiction under which it was required to entertain appeals taken as matter of right without regard to the importance of the questions involved, the business of the Court became so congested that it was fifteen or eighteen months behind in its work. The purpose of the Judiciary Act of 1925 was to restrict or reduce the appellate jurisdiction of the Supreme Court in order to enable it fairly to meet the demands that were made upon it; and quite wisely Congress drastically reduced appeals to the Court as a matter of right but provided discretionary jurisdiction so broad as to enable it to hear any appeal involving questions which in its judgment required review by the highest judicial authority.

Following the spirit and purpose of this Act, the Court has limited the exercise of its discretionary jurisdiction to cases of real importance because of the questions of law involved. It has published in its rules the general principles which guide its exercise of this jurisdiction. Commenting upon the large percentage of Petitions for Review denied by the Court, the Solicitor General in his report said.

"* * * It is quite erroneous to regard the Court as constituted for the correction of error in every case. In the exercise of its discretionary jurisdiction under Judiciary Act of 1925, it has become a court for the decision of important questions of general application and for the settlement of conflicts in the decisions of other courts. The limitations of the Court's statutory jurisdiction and its rules for the exercise of its discretionary jurisdiction should be more carefully observed. Many petitions for writs of certiorari are filed which in the light of settled practice must be regarded as entirely without merit."

The care with which the Court considers each and every one of these petitions should be emphasized. The Chief Justice in his address before the American Law Institute in May, 1934, clearly set forth the practice of the Court in dealing with these applications:

"* * * Some current notions, which have been expressed to me in casual conversations with members of the Bar, reveal extraordinary misconceptions. If there is mystery about this part of our work it should be dispelled. I find that some think that applications for certiorari are distributed among the Justices ratably, that is, one-ninth to each Justice. Others think that the Justice assigned to a Circuit deals with the applications from that Circuit. Now the fact is that all matters calling for action by the Court in the disposition of cases are dealt with by all the members of the Court—unless for some reason a Justice is disqualified or unable to act in a particular case. Thus all the Justices pass upon all the applications for certiorari. During vacation the papers on these applications follow us wherever we are, at home or abroad. Having approximately 300 of them to deal with during the summer, you can see that during the period when the Court is not in session there is a large amount of judicial work to be done. When we meet in the fall, the accumulation of applications is presented to the conference of the Court and then, as throughout the Term, every application is acted upon by the entire Court.

"* * * It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered. I commend to the Bar the provisions of Rule 38 of the Rules of the Supreme Court which deal comprehensively with this subject."

If the Court is to continue the practice which the Chief Justice thus describes it must be obvious that the addition of six Justices to its membership

(all of whom must participate in the consideration of all petitions for review and in all of the conferences at which these matters are to be considered) will not expedite the disposition of its business, but will certainly prolong the conscientious consideration by the whole Court of every question, whether it be an important case or merely a minor motion.

The Court is not and should not be a court for the correction of all errors arising in the course of judicial administration. It is a great court for the settlement of important questions of law affecting the very life of the law itself and the growth and perfection of the administration of justice in the courts of the United States. The Chief Justice himself recently declared before a Committee of Congress:

"* * * Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, because of the character or prominence of the parties, or because of the counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to the counsel, but as to the law. The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved" (Hearing before Senate Judiciary Committee, 74th Congress, First Session, S. 2176.)

The Circuit Courts of Appeals

The Report of the Chief Justice for the Judicial Conference, transmitted to Congress in the Report of the Attorney General, fully discloses the condition of the dockets of the Circuit Courts of Appeals and of the District Courts. The Judicial Conference was provided for in the Act of Congress of September 14, 1922 (U. S. C. Title 28, Sec. 218) and is composed of the Chief Justice and each of the Senior Circuit Judges of the ten Circuit Courts of Appeals. It is required by the statute to make a comprehensive survey of the condition of business in the courts of the United States. It had its annual meeting for this purpose in October 1936 and was aided in the performance of its duties by the Attorney General and the Solicitor General, with their aides. It considered complete statistical reports prepared by the Attorney General disclos-

ing the disposition of pending cases in the Circuit Courts of Appeals and the District Courts, and the time required to reach the trial of civil cases after joinder of issue in all of the District Courts. It also considered reports from each of the Senior Circuit Judges of the ten Circuits based upon reports from the Senior District Judges in each of the Districts, all of which are required to be made by the statute.

The Judicial Conference reported that the reports of the Circuit Judges show that the Circuit Courts of Appeal generally are well up with their work. The Senior Circuit Judge of the Ninth Circuit submitted a request that two additional Circuit Judges be provided for the Ninth Circuit, and the Conference appointed a committee to consider the necessities of the Ninth Circuit.

If the President's Bill becomes law he will be required forthwith to appoint four additional Circuit Judges,—one in the First Circuit, two in the Third Circuit, and one in the Tenth Circuit. He will not be authorized to appoint the two additional Circuit Judges in the Ninth Circuit deemed necessary by the Senior Circuit Judge in that Circuit. As found by the Judicial Conference, and as disclosed by the statistical data published in the Attorney General's Report, there is no need for the appointment of these additional judges in the courts to which they will be appointed.

The District Courts

The Judicial Conference reported with respect to the District Courts that in 51 out of a total of 85 Judicial Districts their business is current; that in these districts all cases ready for trial are disposed of at the term following joinder of issue, and that there were no arrears except as to cases continued at the request of counsel. In only 18 Districts were there delays of over six months. The most serious delays are in the Southern District of California and in the Southern District of New York. In the former District the delay has been reduced from 18 to 8 months by the appointment of additional judges in that district. With respect to the Southern District of New York the Conference expressed the hope that the recent appointment of additional judges would lead to a similar improvement here. After reviewing the condition of work in the various districts the Conference at its session in October recommended only four additional District Judgeships,—one in the Northern District of Georgia, one in the Eastern District of Louisiana, one in the Southern District of Texas and one in the Western District of Washington.

If the President's Bill becomes law he will be required forthwith to appoint thirteen additional District Judges, all

but one of whom will be appointed to District Courts other than those in which additional appointments have been recommended by the Judicial Conference, and all but two of whom will be appointed to District Courts in which the delay between joinder of issue and trial is not more than six months, although there are seventeen other Districts in which such delay exceeds six months.

Assignment of Judges

The provisions of the Bill relating to the assignment of District Judges to other District Courts, are unnecessary and in duplication of existing provisions of law carefully safeguarded so as to provide for the participation of the Chief Justice and of the Senior Circuit Judge whenever an assignment from one Circuit to another is involved. For convenience of reference copies of these statutes are attached. The President's Bill dispenses with these safeguards and expressly limits the assignment of judges from one circuit to another by the Chief Justice to judges *hereafter* appointed. The proposed bill limits the number of Judges to be appointed pursuant to its terms to fifty. The President will be required to appoint twenty-five forthwith unless the Judges who have reached retirement age resign or retire. During the balance of his term at least twenty-five Judges will reach retirement age and if they do not retire or resign he will be required to make all the appointments authorized by his Bill. The table annexed shows the Judges who will be eligible for retirement during the President's term of office. The only judges who may be assigned from one circuit to another under the provisions of the Bill during the President's administration will be those whom he has appointed. It is of importance that the Chief Justice should act in making assignments only as the law now requires, with the concurrence of the Senior Circuit Judges of the Circuits concerned in the transfer. The Bill dispenses with this safeguard in the case of judges *hereafter* appointed. These judges may be assigned to try any case on any of the District Court Calendars. A "mobile force" of itinerant judges nominated by the Chief Executive presently in office, who are to be assigned to try particular cases in communities where they are unknown because, as this Bill provides, they have been so recruited, may lead to abuse.

Furthermore, the proposed law is susceptible of the interpretation that it impliedly repeals all existing provisions of law relating to the assignment of judges from one court to another, and if so interpreted would limit all such assignments to judges *hereafter* appointed.

The fact is that wherever the work of a trial court is congested, with overburdened calendars, and litigants are prejudiced by delay, the regularly sitting judges are always greatly concerned with the effect of protracted cases upon the prompt disposition of their regular calendars. It is for the trial of such cases that the services of visiting judges are peculiarly necessary. (See letter of the Attorney General.) Such cases, in large majority, are cases to which the Government is a party and in which it is vitally concerned. If by operation of statute all such cases are to be tried, so long as President Roosevelt retains office, by itinerant judges all of whom are his personal appointees, our courts and our laws will be brought into disrepute regardless of the impartial probity of those whom he may appoint.

In this connection it should be emphasized that over fifty per cent. of all the cases heard in the Supreme Court of the United States during the last Term of Court were government cases,—that is to say, cases in which the Court must stand as the impartial tribunal before which the rights of a citizen as against the Government are to be determined. In the District Courts 42 per cent. of all the cases, not counting bankruptcy cases, involve controversies between the Government and one of its citizens. Such cases should be tried by judges without regard to the President who signs their Commissions.

Proctor

The provisions of the Bill for the appointment of a Proctor are unnecessary and in duplication of the duties now performed by the Chief Justice, the Senior Circuit Judges, the Senior District Judges and the Attorney General, as required by the Act of Congress of September 14, 1922 (U. S. C. Title 28, Sec. 218). For convenience of reference a copy of said Act is annexed hereto. Comparison will at once disclose that the Proctor is to perform all of the functions now performed by the Senior Circuit and District Judges in advising the Chief Justice, and of the Attorney General as well. If he is to duplicate these services nothing will be accomplished. If he is to displace them the proposal is obviously without merit.

In concluding his Message the President stated:

"This message has dealt with four present needs:

"First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel; second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where federal

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courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving federal statutes."

Only the first three of these "present needs" are dealt with in the Bill now under consideration.

As to the first "need," the proposals insofar as they apply to the Supreme Court will not eliminate congestion. There is none. They are solely designed to give the President power to appoint forthwith six new Justices.

As to the second "need," the law now provides for such transfers under proper safeguards free from governmental influence. Under the President's Bill these safeguards are abandoned with respect to appointees thereunder.

As to the third "need," the reason for this is not apparent. The duties of the Proctor are now required to be and are being efficiently performed by the Judges and by the Attorney General.

Stripped of these avowed but non-existent purposes the President's Bill is reduced to a proposal that he shall forthwith appoint six new Justices of the Supreme Court when there is no need for their appointment upon any proper ground which he has assigned, and that he shall forthwith appoint eighteen additional judges to courts where their services are not needed. The reason for the proposed legislation must be found elsewhere than in the age of the Judges and Justices, the congestion of the dockets or the denial of

petitions for writs of certiorari by the Supreme Court. It is to be found in the President's desire to put into effect without constitutional amendment legislation of the character heretofore held invalid.

Whatever motives may have inspired them, the proposals themselves are intrinsically indefensible. Whether the Executive exercising a controlling influence over Congress may by such means impair the independence of the judiciary without doing violence to the Constitution is beside the point. No President may do so without violating a principle of American government more fundamental than the Constitution itself. A people cannot remain free if

their courts of justice are subservient to the Executive. Such powers as the President demands of Congress, once exercised, with whatever motives, will create for all time a precedent for the abuse of similar powers by one who may hereafter make and enforce the same demands.

Respectfully submitted and filed,

COMMITTEE ON FEDERAL LEGISLATION, VERMONT HATCH, Chairman; SAMUEL BLUMBERG, JOHN NEVILLE BOYLE, SAMUEL C. COLEMAN, CHESTER W. CUTHELL, HERSEY EGGINGTON, MILTON HANDLER, WILLIAM J. HOFF, FRANCIS L. KOHLMAN, HAROLD R. SHAPIRO.

Washington Letter

Municipal Bankruptcy Legislation

THE new municipal bankruptcy bill introduced by Congressman Wilcox, Florida, would replace the Act of May 24, 1934 which the Supreme Court held to be unconstitutional. It would add a chapter, No. X, to the Bankruptcy Act of 1898. The bill was referred to the House Judiciary Committee.

This enactment would be cumulative and in addition to all other acts, and not to be construed as modifying or repealing any existing law relating to refinancing or readjusting the indebtedness of municipalities. It is provided also that it should not be construed as in any way limiting or impairing the power of the State to control or regulate municipalities in the exercise of their governmental powers, including the power to control expenditures for municipal purposes. This legislation would be intended to be permanent and not temporary, as was its predecessor, the 1934 act. Proceedings brought under the act are declared to be within the subject of bankruptcies.

The public taxing agencies, whose assessments and taxes constituting liens on their property are made subject to the bankruptcy court's original jurisdiction in respect to composition of their indebtedness, include: (a) drainage, levee, reclamation, water, and other similar districts generally designated as agricultural improvement districts, (b) local improvement districts, sewer, paving, sanitary, etc., (c) local districts for grading or improving roads, streets, or highways, (d) public school districts, (e) port, navigation and similar districts, and (f) cities, towns, and villages.

Procedure under this proposed new

chapter of the Bankruptcy Act would consist of the filing of a petition setting up that the petitioner is insolvent, being unable to meet its debts as they mature, and is desirous of effecting a composition of its debts; that such a plan is submitted with the petition; and that creditors of the petitioner owning not less than 51 per cent. of the securities affected by the plan have accepted it in writing. In cases of drainage, irrigation, and levee districts the act would require acceptance by only 30 per cent of the creditors. There would be filed with the petition a list of all known creditors and a description of their respective securities, indicating those who have accepted the plan.

A creditor, under the new act, would be considered as affected by the composition plan if he has only a material interest in the composition—the showing of an adverse interest not being required, as under the 1934 act. An individual creditor may controvert, by answer, any material allegation of the petition. After a hearing the court would decide whether the material elements of the case have been sustained or whether it should be dismissed. There are provisions for the classification of claims; for reference to special masters; and for allowance of compensation to attorneys and others if provided for in the plan and not payable from revenues, property, or funds of the petitioner otherwise. A creditor, on thirty days notice, may raise the issue of diligence in prosecuting the petition, or may suggest that the plan will fail to receive the support of the required number of creditors.

There would be required, for the confirmation of any composition, its

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acceptance in writing by creditors representing at least two-thirds of the aggregate amount of all classes of claims affected by the plan. Acceptance would not be required on behalf of claims not affected, where the claims are payable in full in cash, or where the claims are the subject of special treatment. A formal finding by the court on the merits of the plan would be required; and creditors, who might withdraw their acceptance if not satisfied that proposed changes would not adversely affect their interests, would have a right to a hearing and determination by the court of proposals for modification of the plan. Any modified plan would have to comply with the statute and be accepted by the petitioner.

There is a provision for a decree making the plan, when finally confirmed, binding upon all the creditors affected provided the securities and money are put up with the court or other depository. Upon this being done, the petitioner would be entitled to a final decree of discharge from all its debts and liabilities.

Aiding Escape of Prisoners

It will be unlawful to procure or attempt to procure, advise, or assist in the escape of a federal prisoner, or to conceal such prisoner after escape, either before or after conviction, if a bill, H. R. 4012, introduced by Chairman Sumners of the House Judiciary Committee, is enacted. It has passed the House and been referred to the Senate Judiciary Committee. If the prisoner is charged with a felony, the person aiding or abetting his escape would be guilty of a felony and might be punished by imprisonment for 5 years or a fine of \$5,000 or both. Where the prisoner is charged with a misdemeanor, the one aiding or abetting his escape would be subject to imprisonment for one year or a fine of \$1,000 or both.

Food and Drug Injunctions

Injunctions, both temporary and permanent, by the District Courts of the United States would be used as the method of preventing the adulteration, misbranding and false advertising of foods, drugs, devices, and cosmetics in interstate and foreign commerce if the new food and drug bill, S. 5, introduced by Senator Copeland is enacted. It has passed the Senate and is before the Committee on Interstate and Foreign Commerce of the House.

A rather unusual feature is that this law would become effective twelve months after its enactment, the present act remaining in force during that period. The difficulty of developing a general law of this type is further illustrated by the various exceptions which it would contain. For instance, it would

not affect the Butter Standards Act (42 Stat. 1500) the act defining wrapped meats (41 Stat. 271), the Filled Cheese Act, the Virus, Serums and Toxins Act, nor the 1935 amendment of the Food and Drugs Act. Furthermore, meats and meat food products are not within the new act in so far as they are covered by the Meat Inspection Act of 1907.

Among the unlawful acts enumerated which the bill would seek to prevent are traffic in adulterated or misbranded foods, drugs, and cosmetics; the dissemination of false advertising through the mails, radio broadcasts, or other means or in interstate commerce concerning foods, drugs, and cosmetics; violation of the emergency permit provisions; and failure to keep necessary records or to permit their inspection by persons duly authorized. The effort of the new act would be to prevent claims as to the effect of drugs or devices which are false or misleading in any particular, whereas the present law makes fraud the gravamen of the offense and does not prohibit unwarranted claims as to therapeutic merit.

There would be forbidden the traffic in drugs and devices which are dangerous to health under conditions of use prescribed in their labeling or advertisement. Also forbidden would be traffic in drugs containing narcotics or hypnotics for human use, unless sold on prescriptions, or unless bearing a warning on the label as to their possible habit-forming qualities. Labels on drugs and devices would be required to give adequate directions for use and warnings against probable misuse through overdosage or under conditions where use otherwise than as directed might prove dangerous; and, in cases where deterioration might result, that fact would have to be indicated on the label.

The bill provides punishment, for violation of the injunctions which it authorizes, by fines ranging from as much as \$1,000 for some offenses to as much as \$10,000 for other offenses and includes imprisonment penalties which may be added to the fines. In respect to seizures there would be permitted a trial in a district reasonably near the defendant's place of business. If a number of seizures are involved, the cases could be consolidated. In cases of adulteration and misbranding, unlimited seizures would be permitted only when necessary to protect the public interest.

Legal Aid in District of Columbia

The Bar Association of the District of Columbia is undertaking through the Legal Aid Bureau an experiment, to extend perhaps six months, in furnishing free legal services to needy persons who have meritorious cases involving \$50 or less.

The problems are to furnish satis-

factory service to indigent persons; to avoid taking cases which would justify the employment of an attorney on a contingent fee basis; and to dispose properly of those cases found to be not entitled to this gratuitous service. An indigent person is considered to be one who, from his income, is unable to supply himself with the necessities of life and also to pay an attorney's fee.

It is planned to have a panel of 20 or more attorneys who are willing to devote one-half day every two weeks to appearing in the Municipal Court for those unable to pay a fee. This experiment is in the nature of a substitute for an earlier proposal for the establishment of a small claims court in the District of Columbia, of which the local Bar Association voted disapproval.

Maine Legislature Raises Admission Standards

BY A bill which was passed by the legislature and signed by the Governor on March fourth, Maine became the thirty-third state to require two years of college education or its equivalent before admission to the bar.

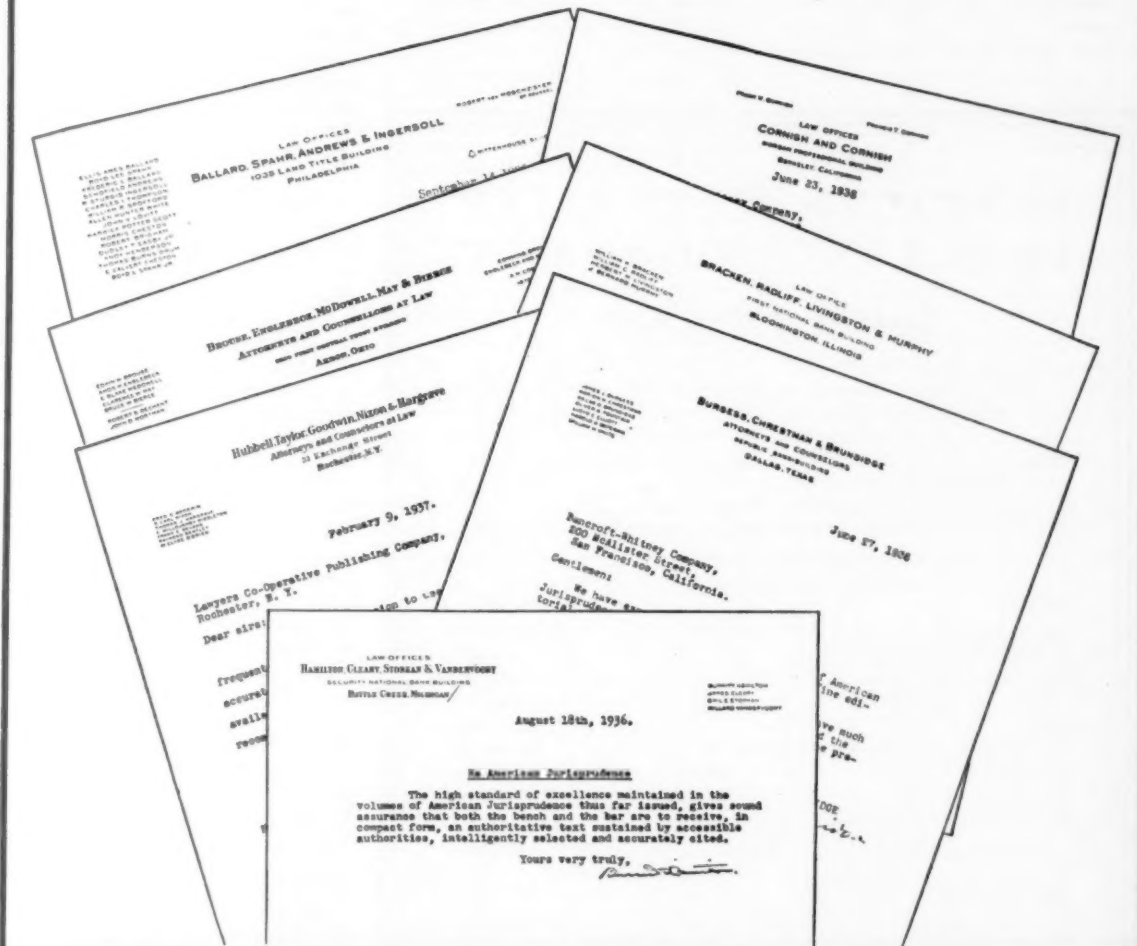
The bill provides that the applicant must have received a preliminary education sufficient to entitle him to admission as a member in good standing of the third year class of Bates College, Bowdoin College, Colby College or the University of Maine or any other college or university approved by the board of examiners, as a candidate for the degree of Bachelor of Arts, Science, Education or Business Administration. No equivalent is recognized except where an approved college or university will admit to third year standing on examination.

Applicants who before July first of this year complete their high school study, which was the general educational requirement under the previous law, may register with the board at any time prior to January 1, 1938; if they have already begun the study of law, they have until January 1, 1939, to register. By making the act effective in the future, the legislature has safeguarded the rights of students who have already begun their law study without having the preliminary qualifications called for in the new act.

The number of examinations which can be taken without special permission is limited to four by the new law, and any applicant who fails in two examinations must pay a fee for each succeeding examination and is not allowed to take a subsequent examination within eleven months of his last previous failure.

Immigrant attorneys are required to pay a fee of \$50 and the board is au-

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thorized to make an investigation of each applicant. Following out this requirement, the board has adopted rules providing for the use of the character examination service of The National Conference of Bar Examiners, which is now being employed by eighteen states.

Maine is the fourteenth state since the beginning of 1934 to adopt a requirement of two years of college education or its equivalent. Of the forty-two thousand students in law schools today, three-fourths of them are attending institutions which require two years of college education for entrance. Prob-

ably at least half of the remaining ten thousand have attained that amount of education before beginning law study. In the thirty-three states which have the two-year college requirement, three-fourths of the population and three-fourths of the lawyers of the country are to be found. In fourteen of the remaining sixteen jurisdictions the state bar association, at its annual meeting or through its governing board, has declared in favor of such a requirement. Arkansas and the District of Columbia are the only two which have not so declared.

American Law Institute Council Holds Mid- Winter Meeting

THE mid-winter meeting of the Council of the American Law Institute was held February 24 to 27 in the Bar Association building, New York City. Since the last meeting of the governing body of the Institute in May, 1936, a large amount of material in preliminary form had been prepared by the Reporters and Advisers in the several fields of present work. At the February meeting the Council considered a number of preliminary drafts of parts of the Restatement of the Law in the subjects of Security, of Torts, divisions I and II, and of Property, divisions I and II.

In addition preliminary drafts of a proposed uniform Property Act and a proposed Uniform Air Flight Act were submitted to the Council by the Reporters. The Uniform Property Act was drafted in cooperation with the National Conference of Commissioners on Uniform State Laws. The Air Flight Act was formulated in cooperation with the National Conference of Commissioners on Uniform State Laws and the American Bar Association.

Owing to death and resignation, there were created three vacancies on the Council. These vacancies were filled by the election of Mr. Garrard Glenn, Professor of Law at the University of Virginia Law School, and an adviser on the Restatement of Security; Judge Orie L. Phillips, United Circuit Court of Appeals, Tenth Circuit, and Chairman of the National Conference of Commissioners on Uniform State Laws; and Mr. Thomas D. Thatcher, former Solicitor General of the United States under President Hoover, and now engaged in the practice of law in New York City.

The Council unanimously adopted the following resolution in memory of Mr. Elihu Root, who had served as Honorary President since the establishment of the Institute in 1922.

"We here record our profound sense of loss in the death of our Honorary President and member of this Council, Elihu Root.

"One of the foremost statesmen of our time, history will record his public services. It is for us here to record that without his interest and leadership, this institute would not have been established; to him we owe the generous cooperation in our work of the Carnegie Corporation, a corporation that has made our work possible. Since the Institute's establishment we have in all matters of importance sought and received the benefit of his wise advice and effective help. The fact of his deep in-

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from \$1,404,878.14, a gain of.....	104,112.25
Premium income increased to.....	\$5,494,416.88
from \$5,042,989.75, a gain of.....	451,427.13
Invested Assets in Cash or Government Bonds 53.8%.	

*\$50,000 was added to the reserve for contingencies now totaling \$200,000.00.

FINANCIAL STATEMENT as of December 31, 1936

ASSETS

Cash in banks.....	\$2,139,961.61
U. S. Government Bonds.....	1,796,639.33
State, county and municipal bonds.....	722,105.79
Public utility and other bonds.....	332,446.01
Stocks.....	737,615.42
First mortgage loans on real estate.....	211,248.84
Real estate.....	174,400.00
Premiums in transmission.....	546,549.52
Accrued interest and other assets.....	37,756.54
Total Cash Assets.....	\$6,698,723.06

LIABILITIES

Reserve for losses.....	\$2,792,321.00
Reserve for unearned premiums.....	1,590,614.00
Reserve for taxes, expenses and dividends.....	606,797.67
Reserve for contingencies.....	200,000.00
Total liabilities except capital.....	\$5,189,732.67
Capital stock.....	\$650,000.00
Net cash surplus.....	858,990.39
Surplus as regards policyholders.....	1,508,990.39
Total.....	\$6,698,723.06

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terest in the Institute and its work has been and will remain a source of inspiration and strength. His firm belief in the soundness of our enterprise has always sustained and encouraged us.

"To our fellow member of this Council, Elihu Root, Jr., and to his brother and sister, we extend our sincere sympathy."

Important Meeting of Comparative Law Congress

THE Second International Congress of Comparative Law will be held at The Hague, The Netherlands, from August 4 to 10, 1937. At the first Congress, held at The Hague in 1932, some seventy Americans were present. A report of the Congress will be found in the American Bar Association Journal for October 1932.

Members of the American Bar Association are especially invited to attend and to participate in the forthcoming Congress, which will provide a meeting ground for lawyers from all over the world to make personal contacts and to discuss their common problems and aspirations. A number of papers have been prepared by American jurists who have specialized in comparative law. There will be sections in which the lawyer may hear and discuss questions centering upon the branch of law in which he is particularly interested.

A list of the subjects to be covered includes, among others, the following: legal history, jurisprudence, civil law and procedure, commercial American law, public law, criminal law and procedure, and international law.

To facilitate arrangements Professor John H. Wigmore of Northwestern University issued a preliminary announcement at the mid-winter meeting of the Association of Law Schools in which he stated that:

"On the French Line SS CHAMPLAIN, sailing July 24 for Plymouth and Havre, a party is planned for attending the Congress. One hundred and fifty reservations have been made. Lectures on the Congress Program will

be given daily on board. . . . At this Congress, owing to the interim formation of the Section of International and Comparative Law our representation will be even 'bigger and better.' For the Congress Program of Topics, consult the American Bar Association Journal for June 1936."

Council of Junior Bar Conference Opposes Supreme Court Plan—Public Information Program Continues

FOLLOWING the 4 to 1 Junior Bar Conference vote against the President's Supreme Court plan, the Conference's Executive Council passed and sent to each member of the Congressional Judiciary Committees a resolution disapproving the proposal as furnishing precedent "for the eventual destruction of the independence of the judiciary."

The text of the resolution follows:

"WHEREAS, it has been proposed to the Congress that the President shall increase the number of the members of the Supreme Court to fifteen in the event that the members of that Court with ten years' service and seventy or more years of age do not resign or retire; and

"WHEREAS, under the circumstances of the present conflict between the Court and Congress and the President, the enlargement of the Court at this time will furnish precedent for the 'packing' of the Supreme Court at times hereafter when conflicts between the Court and the Congress or the Executive exist and for the eventual destruction of the independence of the judiciary; and

"WHEREAS, the Council of the Junior Bar Conference (an organization of lawyers under 36 years of age) believes that an independent judiciary is vital to a 'government of laws and not of men' and to a democratic and republican form of government,

"Now therefore, be it

"RESOLVED, by the Executive Council of the Junior Bar Conference of the

Mr. Wigmore requested early notification to William R. Vallance, 3016 Forty-third Street, Northwest, Washington, D. C., or to Lawrence D. Egbert, 201 East Thornapple Street, Chevy Chase, Maryland, members of the Committee who will facilitate the arrangements for the entire party.

American Bar Association, that the Council thoroughly disapproves of that part of the President's proposal which would permit him to increase the present number of members of the Supreme Court of the United States."

All members of the Council voted for the resolution except Grant B. Cooper and Robert W. Pharr.

This action of the Council climaxed a month of activity in nearly every state as Conference members debated the Supreme Court issue before civic clubs, over the radio, and at "town meetings" in the most extensive public information program ever undertaken by the Junior Bar.

No relaxation of the Conference program is contemplated until the Supreme Court plan is either passed or defeated. Many Junior Bar organizations affiliated with the Conference have recently joined forces with Conference.

Successful and well attended regional meetings of Junior Bar groups took place last month in widely separated parts of the country. Mississippi and Louisiana junior bar members met at New Orleans on March 6. This conference was followed on March 20 by a gathering of New Jersey, Delaware and Pennsylvania members at Philadelphia.

The morning session of the New Orleans meeting was devoted to discussing amalgamation of the Louisiana State

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A. C. Gaw, Secretary,
Elkhart, Indiana.

Bar and the State Bar of Louisiana, and resulted in the establishment of a committee representing the two associations and Junior Bar Conference members of Louisiana to make further studies.

The guest speaker of the afternoon meeting was L. Barrett Jones, member of the American Bar Association Board of Governors, who urged the Conference to build up its group to even stronger standing. Robert W. Pharr, Conference Vice-chairman and eloquent proponent of the President's plan and James N. Ogden, State Chairman of Mississippi, engaged in a vigorous debate on the Supreme Court issue.

Chief Justice O'Niell of the Louisiana Supreme Court was the principal speaker at the dinner that closed the meeting.

Those attending the meetings were loud in their praises of the members of the New Orleans Bar who arranged the conference.

William A. Roberts, former Conference Secretary, was the principal speaker at the Philadelphia meeting, which had been called and was presided over by Joseph Harrison, Council member for the third circuit. Mr. Roberts urged the Conference to lead in the movement to provide effective democratic direction of the Bar. Your Secretary made a few remarks; Guy Tobler, Membership Chairman, urged an increase in Conference membership; L. Stanley Ford and C. Edward Duffy, New Jersey and Delaware State Chairmen respectively, reported on the active Conference programs in their states, and

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Bernard G. Segal, Chairman of the Junior Bar Section of the Pennsylvania Bar Association, outlined Junior Bar work in the Keystone state. Walter Gibbons, Esq., of the Philadelphia Bar, pointed out the ample opportunities within the American Bar Association for expression of liberal points of view.

The enthusiasm engendered by these meetings and the things accomplished by them prove the wisdom of holding similar meetings in other parts of the country.

The creation of two new Junior Sections of State Bar Associations has been accomplished within recent weeks. Upon the recommendation of Donald B. Hatmaker, Council member from the Seventh Circuit, and James B. Economas, Illinois State Chairman, the Board of Governors of the Illinois Bar Association, approved the establishment of a section on younger members' activities.

Junior Bar Section of the Alabama State Bar Association was created early in March by the Board of Commissioners of the Alabama State Bar.

PAUL F. HANNAH, Secretary.

Bar Association of District of Columbia Holds Annual and Special Meetings

THE annual election of officers of the Bar Association of the District of Columbia was held on January 26, 1937. Hon. Henry I. Quinn was elected President in a three-way contest for the position, defeating Mr. Milton King, and Mr. George C. Gertman. Mr. Leo A. Rover, former United States Attorney for the District of Columbia, was elected first Vice President; Mr. Ralph A. Cusick, second Vice President; Wilbur L. Gray, Secretary, to succeed Mr. George C. Gertman who withdrew voluntarily from the Secretary's office after having served seventeen years; and Mr. Bolitha J. Laws, Treasurer.

Three new directors were chosen: Samuel F. Beach, R. Aubrey Bogley and Jo V. Morgan for a term of two years.

Hon. Henry I. Quinn, the new President, has been a member of the Bar Association of the District of Columbia for thirty-three years, and has been very active in Bar Association work and in

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civic and fraternal affairs in the District of Columbia. He is a Member of the Board of Education of the District.

The retiring officers were Walter Bastian, President, Austin Canfield, First Vice President, Thomas Ellis Lodge, Second Vice President and George C. Gertman, Secretary.

At a special meeting of the Bar Association of the District of Columbia held in the Auditorium of the United States Chamber of Commerce on Monday, February 15, 1937, for the purpose of obtaining the views of our members on, and to take action against, the proposal of the President of the United States to increase the Federal Judiciary, as outlined in his message to Congress on February 5, 1937, a resolution was adopted "opposing any legislation of the character disclosed by said bill, H. R. 4417, in so far as it affects the Supreme Court of the United States, for the reason that it is unwise and inexpedient, is not in keeping with the system of checks and balance established by the Constitution of the United States . . ."

WILBUR L. GRAY, Secretary.



HENRY I. QUINN
President District of Columbia
Bar Association